

FILED

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SUPREME COURT CLERK

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

DONALD E. JAMES

APPELLANT

v.

THOMAS L. JAMES

APPELLEE

BRIEF FOR APPELLEE, THOMAS L. JAMES

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

Taylor Circuit Court
Case No. 03-CI-00354

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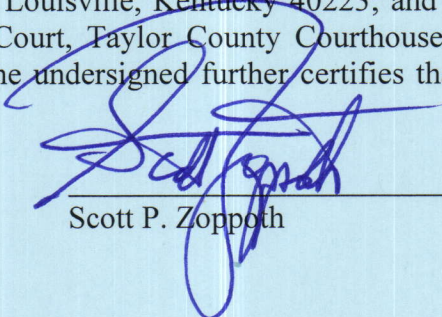
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SUPREME COURT

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CERTIFICATE OF SERVICE

The undersigned hereby certifies the the original and (9) copies of the foregoing were submitted via first class, regular mail, postage prepaid on this the 4 day of May 2009 to the Clerk of the Supreme Court of Kentucky, 209 Capitol Building, 700 Central Avenue, Frankfort, Kentucky, 40601-3488. The undersigned further certifies that a true and correct copy of the foregoing was sent on the same day via regular mail, postage prepaid to the following: Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9230; C. Thomas Hectus, HECTUS & STRAUSE, PLLC, 804 Stone Creek Parkway, Suite One, Louisville, Kentucky 40223; and Hon. Douglas George, Chief Judge, Taylor Circuit Court, Taylor County Courthouse, 203 N. Court Street Campbellsville, KY 42718. The undersigned further certifies that Appellee has not withdrawn the record on appeal.



Scott P. Zoppoth

INTRODUCTION

This civil case involves an alleged breach of fiduciary duty asserted by Donald E. James (Plaintiff/Appellant) against Thomas L. James (Defendant/Appellee). The case was tried before the Honorable Douglas George in the Taylor Circuit Court, and the jury returned a verdict in favor of Appellee on all counts and dismissed all of the Appellant's claims. The Court of Appeals dismissed Appellant's appeal on the basis that it was not timely filed pursuant to Kentucky Civil Rule 73.02, and this Court granted discretionary review of said holding. The sole issue before this Court is the Court of Appeals decision to dismiss Appellant's appeal due to the untimely filing of the same.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant does not believe oral argument is necessary in this action given the issues raised.

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COUNTERSTATEMENT OF THE CASE

This underlying civil action involves an alleged breach of fiduciary duty claim brought against Appellee Thomas L. James (hereafter "Tom James") in his capacity as trustee of the Donald E. James trust. Appellant Donald E. James (hereafter "Don James") was the sole beneficiary of said trust, and the sole corpus of the trust was a business known as James Medical Equipment, Inc. Don James claimed that, as the sole beneficiary of the trust, he suffered economic loss due to an alleged breach of fiduciary duty owed by Tom James as trustee.¹

A jury trial was had in this matter on March 21-22, 2007 before the Honorable Judge Douglas M. George of the Taylor Circuit Court. At the conclusion of two (2) full days of evidence and after deliberation, the jury rendered a verdict in favor of Tom James finding that Tom James did not breach any fiduciary duties to Don James. A final judgment was entered by the trial court on April 24, 2007 in conformity with the jury's verdict in favor of Tom James. (See Exhibit 1).

Don James, by counsel, filed a timely CR 50.02 Motion for Judgment Notwithstanding the Verdict and, in the alternative, a CR 59.01 Motion for a New Trial. After said Motions were briefed by both parties and submitted to the trial court, the court denied Don James's Motions for Judgment Notwithstanding the Verdict and for a New Trial on August 1, 2007. (See Exhibit 2). Included with the trial court's Order was a distribution list certified by the Taylor circuit court clerk indicating that counsel for both parties were sent copies of the Order. (See Exhibit 2). The undersigned counsel for Respondent received his copy on August 2, 2007.

¹ Tom James is Don James' Nephew. Tom agreed to act as trustee of his Uncle's trust out of a sense of family duty, loyalty and love. Tom never requested or received any monetary or other form of compensation for acting as trustee. His only reward was being frivolously sued by his litigious Uncle!

On September 10, 2007, **ten (10) days after the deadline to file an appeal** pursuant to CR 73.02(1)(a), Appellant filed his Notice of Appeal with the Clerk's office. (See Exhibit 3). The Appellant simultaneously filed a Motion to Extend Time to Appeal with the Taylor Circuit Court citing "excusable neglect" due to his alleged failure to receive the trial court's Order of August 1, 2007. (See Exhibit 4). Appellant did **not** merely request leave of court pursuant to CR 73.02(1)(d) to file an untimely appeal and **tender** the Notice of Appeal to accompany his motion. Instead, Appellant actually **filed** his untimely Notice of Appeal on September 10, 2007 **without proper leave of court** to do so at that time.

The Taylor Circuit Court ruled on Don James's Motion to Extend Time for Appeal on October 22, 2007. (See Exhibit 5). The trial court issued an order finding that Don James had shown excusable neglect for failure to learn of the entry of the trial court's Order on August 1, 2007. The trial court extended the time to appeal, not to exceed ten (10) days from the date of the original time. Alternatively, the trial court vacated the Order of August 1, 2007 and reentered the exact same Order as of October 22, 2007. The trial court then further ordered that the Notice of Appeal previously filed by Don James was ordered filed as of October 22, 2007. (See Exhibit 5). The trial court improperly **modified** the recorded date of filing for the Notice of Appeal without any authority or jurisdiction to do so.

Meanwhile, the Court of Appeals issued a Show Cause Order on September 27, 2007 requiring Don James to show cause why the appeal should not be dismissed due to its untimely filing. (See Exhibit 6). After the issues were briefed for the Court of

Appeals by both parties, the Court of Appeals issued an order dismissing Don James's appeal on February 2, 2008. (See Exhibit 7). The Court of Appeals correctly held that:

On September 10, 2007, appellant did not merely tender a notice of appeal with his motion to extend time. Rather, he filed the notice of appeal. At that point, the trial court became divested of the jurisdiction to rule on the motion. As stated in *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990), "[a] notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court." Therefore, we have determined that the notice of appeal was filed in an untimely manner, without any leave to do so.

(See Exhibit 7, pp. 3-4).

In addressing Don James's alternative argument that his Notice of Appeal filed on September 10, 2007 should relate forward to the date the new Order was entered on October 22, 2007, based on the trial court's Order, the Court of Appeals properly held that:

In addition, while the trial court had the jurisdiction to dispose of the motion pursuant to CR 60.02, and while it had the authority, pursuant to *Kurtsinger*, to vacate the order of August 1, 2007, and to re-issue a new order, based upon a finding of mistake or excusable neglect, we do not believe that the court also had the authority to modify the circuit clerk's records as it did by altering the previously recorded date of filing on the notice of appeal.² Rather, we are of the opinion that appellant was required to file a new notice of appeal within thirty days following entry of the order of October 22, 2007.

(footnote omitted) (See Exhibit 7, p. 4).

Thereafter, Appellant filed a Motion for Discretionary Review challenging the Court of Appeals' holding that Don James' Appeal was not timely filed pursuant to CR 73.02. This Court granted Appellant's Motion for Discretionary Review on the limited issues raised in said Motion.

ARGUMENT

Appellant has sought the review of this Court of the decision of the Court of Appeals dismissing Appellant's appeal as untimely filed. Therefore, there are three very narrow procedural issues before this Court on discretionary review. The first issue is whether a trial court has jurisdiction to grant a party's motion for extension of time to file an appeal pursuant to CR 73.02(1)(d) **after** the appellant has already filed an untimely notice of appeal without first being granted leave to do so. The second issue is whether the relation forward doctrine applies to a notice of appeal filed **after** the thirty (30) deadline set forth in CR 73.02 and **before** the party had been granted an extension of time to file the notice of appeal. The third issue is whether a trial court has authority to alter the circuit clerk's records to modify the date that a notice of appeal was filed. These issues are not novel and are fully addressed in the Kentucky Civil Rules and in prior reported Kentucky cases that have interpreted and applied those rules. Said procedural issues do not pertain to any of the substantive claims and issues in the underlying case, and facts of the underlying case are irrelevant to the arguments made to this Court.

I. A Trial Court Does Not Have Jurisdiction to Grant a Party's Motion for Extension of Time to File an Appeal After the Party Has Already Filed the Notice of Appeal.

This case was tried before a jury in Taylor Circuit Court on March 21-22, 2007. A jury verdict was rendered in favor of Appellee Tom James, and a final judgment was entered on April 24, 2007 consistent with the jury's verdict. Appellant Don James filed a CR 50.02 Motion for Judgment Notwithstanding the Verdict and, in the alternative, a CR 59.01 Motion for a New Trial. Both Motions were overruled by the trial court, and an Order evidencing the Court's ruling was entered on August 1, 2007, which procedurally

made the trial court's judgment final and appealable. Therefore, the time limit for Don James filing of an appeal began to run on August 1, 2007, and the thirty (30) time period as set forth in CR 73.02(1)(a) expired on August 31, 2007.

On September 10, 2007, ten (10) days after the deadline prescribed by CR 73.02(1)(a), Don James filed a Notice of Appeal. (See Exhibit 3). On the same day, Don James also filed a Motion to Extend Time to Appeal with the trial court requesting leave of court to file an untimely appeal under CR 73.02(1)(d), which states:

Upon a showing of excusable neglect based on a 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, the trial court may extend the time for appeal, not exceeding 10 days from the expiration of the original time.

Don James cited excusable neglect in failing to receive the Order of August 1, 2007 which commenced the time to appeal. However, on September 10, 2007, Don James made the fatal mistake of actually filing the Notice of Appeal without first obtaining leave of court to file an untimely appeal pursuant to CR 73.02(1)(d).

On October 22, 2007, the trial court issued an Order finding that Don James had shown excusable neglect in failing to learn of the Order entered on August 1, 2007 and extended the time to appeal, not to exceed ten (10) days from the original allowable time period. (See Exhibit 5). In the alternative, the trial court vacated the August 1, 2007 Order and reentered the same Order as of October 22, 2007. Further, the trial court modified the recorded date that the Notice of Appeal was filed, September 10, 2007, and ordered that it was filed as of October 22, 2007. *Id.*

One (1) month prior to the trial court's Order of October 22, 2007, on September 27, 2007, the Court of Appeals issued a Show Cause Order requiring Appellee to show

cause why the appeal should not be dismissed due to the Notice of Appeal having been filed after the thirty (30) time period set forth in CR 73.02. At the time that the Notice of Appeal was filed, and at the time the Show Cause Order was issued, the trial court had not yet granted leave for Appellee to file an appeal under the excusable neglect rule set forth in CR 73.02(1)(d). Given this set of undisputed facts and procedural history, on February 2, 2008, the Court of Appeals correctly dismissed Don James' appeal as being untimely filed. (See Exhibit 7).

Don James's appeal was properly dismissed pursuant to CR 76.34(6) because it was not prosecuted in conformity with the Rules. CR 76.34(6) states, "an adversary party may move to dismiss an appeal or cross-appeal because it is not within the jurisdiction of the appellate court or because it has not been prosecuted in conformity with the Rules." Fatal to Appellant's appeal is that he did not file his Notice of Appeal within the time prescribed by CR 73.02, and the Taylor Circuit Court did not have jurisdiction to decide the Motion for Extension of Time to Appeal after Don James had already filed his Notice of Appeal. The appellate courts have exclusive jurisdiction to determine if an appellant's appeal was timely filed and timely prosecuted. The trial courts have no say in this matter.

Appellant argues that he filed the Notice of Appeal on September 10, 2007 because the trial court would not have been able to rule on his motion until after the ten (10) day extension of time to file. In his Response to the Court of Appeals' Show Cause Order, he states: "Counsel for Appellant filed the Notice of Appeal even though the Taylor Circuit Court has not yet ruled on plaintiff/appellant's Motion for an Extension of Time, because counsel for Appellant was unsure whether the trial court could permit the filing of a Notice of Appeal *more than* (10) days after the expiration of the normal time to

file, even though the appropriate Motion was timely filed to extend the time.” (See Exhibit 8, p. 3).

However, Kentucky has long-standing, specific case law addressing this exact circumstance, and there is no dispute as to the procedure for commencing an appeal under facts similar to the present case. In *Rodgers v. Henderson*, 612 S.W.2d 743 (Ky. App. 1980), it was determined that the trial court may issue a nunc pro tunc order if it is unable to rule on a motion to extend time for appeal under CR 73.02(1)(d) before expiration of the ten (10) day extension period, thereby retroactively preserving the moving party’s right to appeal. The facts in *Rodgers* are nearly identical to the case at bar, with the one exception that the moving parties in *Rodgers* merely **tendered** their notice of appeal with the motion but did not actually file the notice of appeal until after the court granted the motion. In *Rodgers*, attorney for the appellant claimed that he did not receive the trial court’s final order of judgment until after the time to appeal had expired. Counsel for appellant promptly filed a motion to extend time to appeal and tendered the notice of appeal to the trial court. After the trial court made a finding of excusable neglect, it issued a nunc pro tunc order extending the time to file the notice. *Id.* at 744.

The Court of Appeals in *Rodgers* upheld the decision of the trial court and found that the trial court properly permitted the appellants to file their notice of appeal. *Id.* The court further stated: “The workload of the circuit courts and practical considerations dictate that the matter cannot always be heard within the 10-day period of time. As long as the appellant moves to file the notice of appeal within 10 days from the date that it was originally due pursuant to CR 73.02(1)(a), **and tenders a copy of that notice**, the circuit

court may grant such an extension upon a proper showing of excusable neglect. **If the motion cannot be ruled upon until after the 10-day period has passed, a nunc pro tunc order should be issued.**” *Id.* at 745 (emphasis added).

Further, once Don James filed his Notice of Appeal in the present case, the Taylor Circuit Court did not have jurisdiction to hear Don James’s Motion for Extension of Time to Appeal, and, therefore, did not have jurisdiction to enter the Order of October 22, 2007 allowing the late filing of the appeal. Kentucky case law on this issue is unequivocal and crystal clear. In *Mounsour v. Humphrey*, the court held that “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...the circuit court is deprived of jurisdiction of the case to the same extent as when a valid appeal is pending.” 324 S.W.2d 813, 814-15 (Ky. App. 1959).

This Court elaborated on this rule in *Johnson v. Smith*, 885 S.W. 2d 944 (Ky. 1994). In *Johnson*, this Court explained that the timely filing of a notice of appeal in compliance with CR 73.02 is the method by which the jurisdiction of the appellate court is invoked and that automatic dismissal of an appeal is the penalty for late filing of such a notice. *Id.* at 950. Under this Court’s clear mandate in *Johnson*, once Don James filed his Notice of Appeal, the Taylor Circuit Court was divested of jurisdiction to rule on his Motion to Extend Time to File an Appeal, and the Court of Appeals acquired exclusive jurisdiction of the appeal. Therefore, the trial court’s Order of October 22, 2007 extending the time to appeal was invalid because the trial court lacked jurisdiction to enter said Order. The relevant rules and case law specifically on this issue are irrefutable and undeniable.

As cited by the Court of Appeals in its Order Dismissing Appeal, this Court has determined that a trial court is divested of jurisdiction once a notice of appeal has been filed. In *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990), this Court held that “[a] notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court.” Further, failure to file a timely notice of appeal is a jurisdictional defect that cannot be remedied. *Id.* (citing *Manly v. Manly*, 669 S.W.2d 537, 539 (Ky. 1984)).

There is absolutely no dispute that Don James failed to timely file his Notice of Appeal. CR 73.02(1)(a) states, “the notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2).” The Taylor Circuit Court denied Don James’s Motion for Judgment Notwithstanding Verdict or for a New Trial on August 1, 2007. Appellant’s Notice of Appeal was originally filed on September 10, 2007. This was **40 days** after the Taylor Circuit Court denied Don James’s Motion and entered its Final Order, and **10 days** after the Appellant’s deadline to file his Notice of Appeal.

The fact that Don James filed the Notice of Appeal before he was granted an extension of time to file the appeal is dispositive of this issue. Pursuant to *Rodgers, supra*, Don James should have filed his motion to extend time to appeal and **tendered** a copy of the notice of appeal with the motion. If the Court made a finding of excusable neglect, it could have entered a nunc pro tunc order preserving Don James’s right to appeal. At that time, after proper leave had been granted, Don James could have then properly filed a notice of appeal. Instead, because he filed the Notice of Appeal **before** being granted an extension by the trial court, the trial court was divested of jurisdiction to

rule on said motion. *Johnson*, 885 S.W. 2d 944. At which time, jurisdiction rested solely with the Court of Appeals to determine whether the appeal was timely filed. The Court of Appeals correctly determined that the appeal was not timely filed and dismissed the appeal in its Order of February 4, 2008. This decision should be upheld, since it is in conformity with the relevant civil rules and prior court decisions and precedent directly on point.

II. The Relation Forward Doctrine Does Not Apply to an Appeal Filed After the Deadline Set Forth in CR 73.02 and Before the Party Had Been Granted an Extension of Time by the Trial Court.

Appellant argues that the relation forward doctrine should apply to the facts of this case to allow his “prematurely” filed appeal to relate forward to October 22, 2007. Appellant’s argument is without merit and lacks any precedent under Kentucky law to apply the relation forward doctrine to the present facts. This Court has only applied the relation forward doctrine in very limited circumstances that are not even remotely similar to the facts of this case. In *Johnson*, 885 S.W.2d 944, this Court held that a civil appeal should not be dismissed as premature due to the filing of a post-trial motion **by another party severally affected by the judgment**. Such an appeal should be treated and construed as relating forward and deemed to have been filed upon entry of the proper final judgment. *Id.*

In *Johnson*, one of the many litigants in a civil proceeding filed a CR 59 motion for a new trial, while the other litigants did not file post-trial motions but instead filed notices of appeal. *Id.* at 946. The question presented to the Court in *Johnson* was whether the parties who did not file post-trial motions were required to file new notices of appeal once the trial court denied the moving party’s post-trial motions. *Id.* at 947. In

discussing the federal approach to premature appeals, this Court acknowledged that the U.S. Supreme Court's approach protects the litigant who "reasonably but mistakenly believes [the order or judgment entered against him] to be a final judgment, while failing to file a notice of appeal from the actual final judgment." *Id.* at 950 (citing *FirstTier Mortgage v. Investors Ins. Co.*, 498 U.S. 269, 276, 111 S.Ct. 648, 652-53 (1991)). This Court further held in *Johnson* that "the reasons for finality that provide the underpinning for mandating automatic dismissal of a *tardy* notice of appeal do not adhere to a *premature* notice of appeal, **at least to a notice which is "premature" only because other parties severally affected by the judgment have filed post-judgment motions suspending finality as to those other parties.**" *Id.* (emphasis added).

In the case at bar, Don James did not file a "premature" notice of appeal. He filed a **tardy** appeal beyond the deadline clearly set forth in CR 73.02. The trial court had not yet granted leave for an extension of time to file the appeal at the time that he actually filed the appeal. Therefore, when the trial court "reissued" its final Order on October 22, 2007, Don James should have filed a notice of appeal from said Order within the thirty (30) day deadline prescribed by CR 73.02. His **tardy** appeal that was previously filed, without leave of court, should not relate forward to the Order of October 22, 2007.

Further, Appellant relies heavily on a recent Opinion and Order of this Court in *Board of Regents of Western Kentucky University v. Clark, et al.*, 276 S.W.3d 819 (Ky. 2009), to support his position that the relation forward doctrine should apply to the present case. In *Regents*, this Court applied the relation forward doctrine in a condemnation action wherein the appeal was filed prematurely, i.e. before the interlocutory judgment became final. The Movant, Western Kentucky University, filed a

motion to dismiss the appeal alleging that Clark should have sought interlocutory relief pursuant to CR 65.07, and, therefore, the appeal was improper. *Id.* at 820.

This Court distinguished the facts in *Regents* due to the unique nature of condemnation proceedings. The trial court's order in the *Regents* condemnation proceeding was an interlocutory judgment that would automatically become final after thirty (30) days if no party filed exceptions to the judgment. *Id.* at 820. Clark did not file exceptions but, rather, filed an appeal within twenty (20) days of the trial court's entry of the interlocutory judgment. Because nothing prevented the interlocutory order from automatically becoming final after expiration of the thirty (30) day exception period, this Court in *Regents* allowed Clark's notice of appeal to relate forward to the time when the interlocutory judgment became final. *Id.* at 821.

However, the case at bar is factually distinct from both *Regents* and from *Johnson*. Both cases addressed situations wherein the notice of appeal was filed prematurely. In *Regents*, the notice of appeal was filed before the interlocutory order became final. In *Johnson*, the notice of appeal was filed before the trial court had ruled upon the post-trial motions of other parties to the case.

In the present case, Don James's Notice of Appeal was **not** filed prematurely. It was filed ten (10) days **after** the time period prescribed by CR 73.02 and before the trial court granted leave to file a late appeal. Therefore, under the Kentucky Civil Rules as written, Don James's appeal was untimely filed and was properly dismissed by the Court of Appeals. When the trial court entered a new order on October 22, 2007, Don James was required to file a "new" notice of appeal from said Order. There is no precedent in Kentucky law to allow a tardy appeal to relate forward to the time that a new order is

issued. Issuance of the new order on October 22, 2007 commenced Don James's time to appeal as set forth in CR 73.02, and Don James had an additional thirty (30) days to appeal the final order. The relation forward doctrine has not been applied, and should not be applied, to allow a tardy appeal to relate forward to the time a new order is issued by the trial court. The new order commenced the time period within which to file a notice of appeal, and Don James did not appeal the Order of October 22, 2007.

III. A Trial Court Does Not Have Authority to Alter the Circuit Clerk's Records to Modify the Date a Notice of Appeal Was Filed.

In the trial court's Order of October 22, 2007, the trial court granted, in the alternative, Don James's motion to vacate the original Order of August 1, 2007 and issued a new Order as of October 22, 2007. In the new Order, the trial court held that "...the Plaintiff's Notice of Appeal, previously tendered on September 10, 2007, is hereby ordered filed as of this date." With the Order, the trial court was attempting to alter the circuit clerk's records and change the date that the Notice of Appeal was filed. The trial court was simply without authority to unilaterally alter the circuit clerk's records in an improper attempt to ensure that Don James' Notice of Appeal was timely filed.

In dismissing the appeal, the Court of Appeals properly determined that while the trial court had the authority to vacate the original order and issue a new order, it did not have the authority to alter the date that the Notice of Appeal was filed:

...we do not believe that the court also had the authority to modify the circuit clerk's records as it did by altering the previously recorded date of filing of the notice of appeal. Rather, we are of the opinion that appellant was required to file a new notice of appeal within thirty days following entry of the order of October 22, 2007.

(See Exhibit 7, p. 4).

If trial courts were granted the authority to alter circuit clerk's records to adjust filing dates, this would wreak havoc on the rules of court procedure and the rules that have been set forth to govern appellate procedures in this state. The date that a pleading has been filed with a court cannot and should not be altered at the will of a trial court based on a party's neglect in failing to follow well-established court rules and adhere to deadlines. The rules of appellate procedure are established and have been set forth to allow for an orderly appellate process and to bring finality to decisions of the circuit courts. If the rules are circumvented to accommodate parties who fail to adhere to the established guidelines and accepted rules, then such guidelines and rules become meaningless.

It is apparent in this case that Appellant is requesting that this Court alter the long-standing rules of appellate procedure to accommodate the failure to properly and timely prosecute his appeal. Appellant missed the thirty (30) day deadline to file the appeal because his counsel claimed he did not receive the Court's original Order of August 1, 2007. Next, Appellant actually filed the Notice of Appeal with the Court of Appeals instead of tendering the notice with his motion to extend time to appeal with the trial court, despite the proper procedure for such situations being clearly set forth in *Rodgers*, 612 S.W.2d 743, *supra*. Finally, after the trial court vacated the original order and issued a new order of October 22, 2007, Appellant did not file a new notice of appeal within the thirty (30) day deadline that commenced on the day the new order was issued. Appellant now requests that this Court excuse all of his mistakes and make new policy to circumvent long-standing rules, guidelines and court precedent to accommodate his "right" to appeal. Appellant had the right of appeal protected by the Kentucky

Constitution, but he simply failed to follow the appellate rules and procedures to enforce that right.

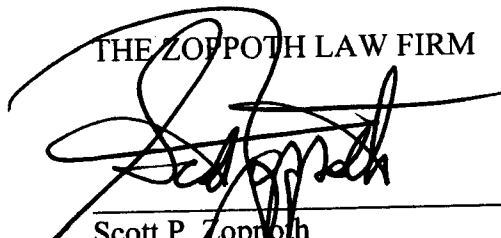
CONCLUSION

The Court of Appeals properly dismissed Appellant's appeal because the Taylor Circuit Court had been divested of jurisdiction to issue an extension of time to appeal once Don James actually filed the Notice of Appeal prior to obtaining the required leave of court. The relation forward doctrine has not been applied, and should not be applied, to protect a tardy appeal not prosecuted in conformity the Kentucky Civil Rules and prior court precedent. Further, the trial court did not have the authority to alter the circuit clerk's records to modify the date that the Notice of Appeal was filed.

WHEREFORE, Appellee, Thomas L. James, respectfully requests that the Court affirm the holding of the Court of Appeals dismissing the appeal brought by Appellant, Donald E. James.

Respectfully submitted,

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