

Supreme Court of Kentucky

DOCKET NO. 2008-SC-000348
COURT OF APPEALS CASE NOS. 2006-CA-002124-MR,
2006-CA-002165-MR, 2006-CA-002166-MR

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SUPREME COURT CLERK

LOUISVILLE GAS AND ELECTRIC COMPANY;
KENTUCKY UTILITIES COMPANY;
and E.ON U.S. LLC

APPELLANTS

v.

On Appeal from the Franklin Circuit Court
Civil Action No. 06-CI-1041, Division 2

HARDIN & MEADE COUNTY, PROPERTY
OWNERS FOR CO-LOCATION; CDH PRESERVE, LLC;
CHARLES THOMPSON; GERALDINE THOMPSON;
JAMES K. THOMPSON; SANDY THOMPSON;
SAMUEL COYLE; EWONA COYLE; FLOYD DODSON;
IRENE DODSON; MARY JENT; VIOLET MONROE;
DIANE OWSLEY; KENNETH WIMP; DENNIS
CUNNINGHAM; CATHY CUNNINGHAM and
KENTUCKY PUBLIC SERVICE COMMISSION

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CERTIFICATE OF SERVICE ON BACK OF COVER

INTRODUCTION

Plaintiffs appealed a decision of the Kentucky Public Service Commission to the Franklin Circuit Court, but failed to file either the mandatory designation of the administrative record, or a motion for extension of time, prior to the statutory deadline for perfecting the appeal. The Franklin Circuit Court dismissed Plaintiffs' appeal for lack of jurisdiction. Despite well-settled precedent that the civil rules are not applicable to administrative appeals until after the appeal has been perfected pursuant to the governing statute, the Court of Appeals erroneously applied CR 6.02 to permit the untimely motion for an extension. The Court of Appeals reviewed *de novo* the circuit judge's discretionary decision that Plaintiffs had failed to demonstrate good "cause" for missing the mandatory deadline, rather than applying the applicable abuse of discretion standard. The Court of Appeals' decision erroneously reversing the Franklin Circuit Court was contrary to longstanding precedent and should be reversed.

STATEMENT CONCERNING ORAL ARGUMENT

Although the issues raised in this appeal can be readily decided based on well-settled precedent, Appellants Louisville Gas and Electric Company, Kentucky Utilities Company and E.ON U.S. LLC nonetheless believe that oral argument may be useful to the Court in understanding the Court of Appeals' departure from that controlling precedent.

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STATEMENT OF THE CASE

This case arises out of two orders by the Kentucky Public Service Commission (“KPSC”) granting Louisville Gas and Electric Company and Kentucky Utilities Company (collectively “the Companies”) the requisite Certificate of Public Convenience and Necessity (the “CPCN”) for construction of a forty-two mile electrical transmission line running through portions of Jefferson, Bullitt, Hardin and Meade counties.¹ See KPSC orders, attached hereto as Appendix A. The CPCN authorizes the Companies to construct the transmission line to protect the reliability of service to hundreds of thousands of customers across the Commonwealth by relieving increasing usage demands on the existing transmission facilities, and to integrate the previously approved expansion of the Companies’ Trimble County generation facility into the Companies’ system.²

Plaintiffs’ request for a stay of the KPSC order pending this appeal was denied. Appendix B at 4. In the intervening two years, the Companies have proceeded with construction of the transmission line.

Plaintiffs sought review of the KPSC orders in the Franklin Circuit Court pursuant to KRS 278.410-40. (RA 1-5). Pursuant to KRS 278.420(2), Plaintiffs had ten days after filing their Complaint in the Franklin Circuit Court to perfect their appeal by designating the record on appeal. The statute provides:

Unless an agreed statement of the record is filed with the court, the filing party **shall designate, within ten (10) days after an action is filed, the**

¹ E.ON U.S. LLC was not a party before the KPSC, and is named in the motion for discretionary review only because it was incorrectly named as a party in the Franklin Circuit Court (and Court of Appeals) by Plaintiffs. E.ON U.S. LLC is the parent company of Louisville Gas and Electric Company and Kentucky Utilities Company.

² The expansion of the generation facility was approved by a previous KPSC order that is not at issue in this appeal. That expansion is now nearly complete and the new unit will be operational in a matter of months.

portions of the record necessary to determine the issues raised in the action. Within ten (10) days after the service of the designation or within ten (10) days after the court enters an order permitting any other party to intervene in the action, whichever occurs last, any other party to the action may designate additional portions for filing. The court may enlarge the ten (10) day period where cause is shown. Additionally, the court may require or permit subsequent corrections or additions to the record.

KRS 278.420(2) (emphasis added). No designation of record – and no motion for enlargement of time for the designation – was filed within the timeframe mandated by the statute.

The Companies moved to dismiss the appeal for lack of jurisdiction. (RA 27-34). Plaintiffs then belatedly sought an extension of time to make the designation, arguing only that the statute permitted an extension of time for good “cause.” (RA 35-39). As the purported “cause,” Plaintiffs claimed only a busy schedule for one of their counsel.³ (RA 40).

The Companies and the KPSC opposed the extension, arguing under the square holding in *Forest Hills Developers v. Pub. Serv. Comm'n*, 936 S.W.2d 94 (Ky. App. 1996), that the failure to timely designate the record deprived the circuit court of jurisdiction, that an extension of time requested after the deadline was not permitted by the statute and that, in any event, Plaintiffs had failed to establish good cause to justify any extension. (RA 58-78).

The Franklin Circuit Court found as a fact that Plaintiffs had failed to establish good cause to justify the requested extension of time to perfect the appeal, and therefore

³ Plaintiffs’ other counsel filed an affidavit merely stating that he had “believed” that co-counsel would handle the designation of record and that, as a result, he did not “docket the designation of the record ...” himself. (RA 44-45).

dismissed the appeal for lack of jurisdiction. *See* Franklin Circuit Court Order of August 28, 2006 at 2, attached hereto as Appendix C.⁴ Plaintiffs appealed the dismissal.

In the Court of Appeals, Plaintiffs argued that substantial compliance should apply to administrative appeals and that their counsel's excuse constituted good cause for an extension of time to designate the record.⁵ The Companies and the KPSC argued that Circuit Judge Wingate had not abused his discretion when he found that the failure to calendar the deadline for perfecting the appeal did not constitute good cause for an untimely motion for an extension of that due date. The Companies and the KPSC also contended alternatively that the statute – strictly construed – did not authorize an extension requested after the deadline had expired. In a 2-1 decision, the Court of Appeals reversed Judge Wingate.

The Court of Appeals' majority opinion did not expressly adopt substantial compliance for administrative appeals – for the obvious reason that Plaintiffs' argument is directly contrary to this Court's recently reaffirmed precedents. *See* Opinion, attached hereto as Appendix D. But the majority effected the same result by holding that CR 6.02 authorized the circuit court to enlarge the statutory time period after it had expired. The majority further held that the lenient interpretation of the "excusable neglect" standard for deadlines to which CR 6.02 applies is equivalent to the statutory language requiring good "cause" to extend the deadline for perfecting an appeal from an order of the KPSC.

And, despite the Franklin Circuit Court's express finding that Plaintiffs' counsel's excuses were not sufficient "cause" under the statute, the majority made a *de novo*

⁴ The Circuit Court said that KRS 278.420(2) authorized the Circuit Court to enlarge the time for designating the record, but that "the Court only has that discretion to enlarge 'where cause is shown.'" Appendix C at 2.

⁵ Court of Appeals Brief for Plaintiffs at 8-14.

determination that the excuses met its own newly created standard – without offering any explanation why the majority was totally ignoring the abuse of discretion standard that governs appellate review of that discretionary decision. Opinion at 10-11.

Judge Moore dissented. Citing this Court’s decision in *Bd. of Adjustments v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978), she correctly stated: “It is well settled that an appeal from an administrative agency’s decision to the circuit court is a matter of legislative grace and strict compliance is mandatory.” Opinion at 11. Judge Moore therefore concluded that *Forest Hills* should control the disposition of the appeal. *Id.* The dissent also correctly stated that “[a] determination of good cause is properly within the province of the circuit court, and our Court does not disturb the circuit court’s discretion unless we find abuse.” Opinion at 12.

In a Petition for Rehearing – their very first opportunity to address the majority’s *sua sponte* rationale – the Companies set forth the controlling precedents from this Court and the prior decisions of the Court of Appeals directly on point. Rehearing was nonetheless denied in an order that also ordered the 2-1 decision to be published. Court of Appeals Order of April 15, 2008, attached hereto as Appendix E.

This Court thereafter granted both the Companies’ and the KPSC’s motions for discretionary review.

SUMMARY OF ARGUMENT

It is well-settled in Kentucky that statutes governing appeals from administrative agencies are strictly construed. *Hutchins v. Gen. Elec. Co.*, 190 S.W.3d 333, 336-37 (Ky. 2006). Without citing this Court’s recent decision in *Hutchins* reaffirming prior precedent requiring strict compliance, the Court of Appeals’ majority opinion attempted

to create a policy of substantial compliance with statutory procedures governing administrative appeals. Specifically, the Court of Appeals' majority opinion ignored controlling precedent and erroneously held that CR 6.02 authorizes a circuit court to enlarge the time period prescribed by the governing statute for perfecting an administrative appeal, even after the statutory deadline has expired. Opinion at 7-8.

While never expressly using the label "substantial compliance," the majority opinion clearly applied a policy of substantial compliance when it held that CR 6.02 should be applied "in such a manner as to facilitate rather than to frustrate an adjudication of the issues on the merits" [Opinion at 9] to effect "the reasonable application of statutory and procedural rules that provide for a meaningful appeal." Opinion at 10-11. But it is settled law that the doctrine of substantial compliance applies only to appeals of court decisions, and is totally inapplicable to statutory appeals from administrative agencies. *Hutchins*, 190 S.W.3d at 336-37, citing *Ky. Unemployment Ins. Comm'n v. Carter*, 689 S.W.2d 360 (Ky. 1985).

It is equally well-settled that "[t]he civil rules do not apply in this type of litigation until after the appeal has been perfected." *Bd. of Adjustments v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978). Until the appeal has been perfected in strict compliance with the governing statute, the circuit court is without jurisdiction and the civil rules are inapplicable. *Id.*

The Court of Appeals compounded its error by misinterpreting the statutory requirement of "cause" for any enlargement of time for perfecting the appeal. The majority erroneously applied CR 6.02 and relied *sua sponte* upon inapposite caselaw interpreting "excusable neglect" for purposes of filing tardy proofs of claim in federal

bankruptcy court. Applying that lenient standard, the Court of Appeals reviewed the Circuit Court's decision as to cause *de novo*, rather than under the required abuse of discretion standard.

This Court should reverse the Court of Appeals' decision, and reinstate the Franklin Circuit Court's dismissal of Plaintiffs' appeal from the KPSC ruling.

ARGUMENT

I. **Under the express provisions of KRS 278.420(2), Plaintiffs' failure to timely designate the record on appeal – or to timely request an extension of time to do so – deprived the Circuit Court of jurisdiction and mandated dismissal of Plaintiffs' appeal from the decision of the KPSC granting CPCN.**

A. **The doctrine of *stare decisis* requires strict construction of statutes governing appeals from administrative agencies.**

This Court has repeatedly held that statutes governing appeals from administrative agencies are strictly construed. This well-settled rule was recently affirmed in *Hutchins*:

The right to appeal the decision of an administrative agency to a court is a matter of legislative grace; therefore, the **statutory conditions for invoking the power of the court to hear such an appeal are strictly construed.**

190 S.W.3d at 336-37 (emphasis added).

In *Hutchins*, this Court cited with approval both *Carter* and *Flood*, reaffirming the rule of strict compliance:

There is no appeal to the courts from an action of an administrative agency as a matter of right. **When grace to appeal is granted by statute, a strict compliance with its terms is required.** Where the conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that **the court lacks jurisdiction** or has no right to decide the controversy. . . . It is plain as a billboard that the legislature has granted to persons aggrieved by the final action of the board of adjustments the grace of appeal to the circuit court **provided they perfect that appeal** Consequently, one of the conditions

precedent to the exercise of judicial power by the circuit court was not met and **it was required to dismiss the appeal for want of jurisdiction.**

Flood, 581 S.W.2d at 2 (emphasis added). *Accord Varney v. Coleman*, No. 2004-SC-0308-MR, 2004 WL 2365211, at *1 (Ky. Oct. 21, 2004) (attached hereto as Appendix F) (“Strict compliance with the statutory requirement for appealing an administrative agency’s decision is necessary to invoke the reviewing court’s jurisdiction”).

These precedents require strict construction of statutory deadlines for filing and perfecting appeals from administrative agencies. *Flood*, 581 S.W.2d at 2. The doctrine of substantial compliance with appellate procedure applies only to court decisions, and is inapplicable to jurisdictional prerequisites to appeals from administrative agencies. *Bowen v. Commonwealth ex rel. Stidham*, 887 S.W.2d 350, 352 (Ky. 1994).

The Court of Appeals has routinely followed these precedents and held that the doctrine of *stare decisis* required it to apply strict compliance to statutory appeals from administrative agencies:

We perceive our duty as an intermediate appellate court as binding us to defer to principles well established in Kentucky case law. That concept is, in our opinion, basic to a system of jurisprudence founded upon the doctrine of *stare decisis*. Whatever our view of the advisability of the policy set out in that precedent, we are precluded from simply choosing not to follow the law.

Fisher v. Ky. Unemployment Ins. Comm’n, 880 S.W.2d 891, 892 (Ky. App. 1994). *See also Frisby v. Bd. of Educ.*, 707 S.W.2d 359 (Ky. App. 1986).

Indeed, the Court of Appeals has traditionally applied strict construction to statutory deadlines for filing and perfecting appeals from the KPSC. *See Forest Hills Developers v. Pub. Serv. Comm’n*, 936 S.W.2d 94, 96 (Ky. App. 1996) (failure to timely designate appellate record deprived court of jurisdiction). *See also Callihan v. Grayson Rural Elec. Coop. Corp.*, No. 2007-CA-1227-MR, 2008 WL 5102124, at *2 (Ky. App.

Dec. 5, 2008) (attached hereto as Appendix F) (relying upon *Forest Hills* to affirm dismissal after failure to timely designate appellate record);⁶ *Krauser v. Pub. Serv. Comm'n*, No. 2001-CA-002006-MR, 2003 WL 21360560, at *2 (Ky. App. June 13, 2003) (no jurisdiction to enlarge time to designate record) (attached hereto as Appendix F);⁷ *Spears Water Co. v. Ky. Pub. Serv. Comm'n*, No. 1998-CA-001925-MR, slip op. (Ky. App. Nov. 12, 1999) (no jurisdiction to enlarge time to designate record) (attached hereto as Appendix F); *Nuckols Farm, Inc. v. Pub. Serv. Comm'n*, No. 96-CA-2069-MR, slip. op. (Ky. App. Oct. 3, 1997) (Schroder, J.) (no jurisdiction to enlarge time to designate record) (attached hereto as Appendix F).⁸

But in this case, the Court of Appeals' majority opinion ignored the controlling precedent of *Hutchins*, *Carter* and *Flood* and made only passing reference to its own

⁶ The unpublished decisions are not cited as binding precedent but to recite the prior conflicting decisions of the Court of Appeals on this precise point. CR 76.28(4)(c). The Court of Appeals similarly recited that the majority had "reviewed our published and unpublished opinions" Opinion at 6.

⁷ In *Krauser*, the Court of Appeals held:

In *Forest Hills*, *supra*, this Court held that KRS 278.420(2) required the party filing an action in circuit court pursuant to KRS 278.410 to timely and properly designate the portions of the record necessary to resolve the issues raised in the action. This Court further held that the failure of the party to timely and properly designate the record deprived the circuit court of subject-matter jurisdiction to adjudicate the action. . . .

The holding in *Forest Hills* is clear and it requires the timely and proper designation of the record pursuant to KRS 278.420 in order for the subject-matter jurisdiction of the Franklin Circuit Court to be invoked pursuant to KRS 278.410.

Krauser 2003 WL 21360560, at *2 (emphasis added).

⁸ *Arlinghaus Builders, Inc. v. Ky. Pub. Serv. Comm'n*, 142 S.W.3d 693 (Ky. App. 2003), cited below by Plaintiffs, does not apply substantial compliance to a statutory requirement applicable to an appeal from an administrative agency. In that case, the statute was silent concerning the manner in which the appellant served notice of filing the appeal. 142 S.W.3d at 695. The requirement of serving process arose from the Civil Rules, not from any statute. *Id.* This Court simply applied the case law governing the commencement of actions in circuit courts. The appellant in *Arlinghaus* did not fail to satisfy any statutory prerequisites for perfecting the appeal.

prior published decision in *Forest Hills*. Instead, the majority opinion postulated that “the circuit court correctly held that it could in its discretion enlarge the ten-day period prescribed for the designation of the record” even when the motion was filed after the deadline had passed. Opinion at 6. That is simply not the law.

While not expressly adopting substantial compliance for administrative appeals, the Court of Appeals’ decision to apply CR 6.02 “in such a manner as to facilitate rather than to frustrate an adjudication of the issues on the merits” [Opinion at 9] is a thinly disguised end-run around *Hutchins* and other controlling precedent from this Court. Simply stated, the majority opinion in this case attempted to make a fundamental change in Kentucky law requiring strict compliance with statutes governing administrative appeals. But that is not the role of the intermediate appellate court in the Court of Justice.⁹

“Unlike some jurisdictions, *stare decisis* has real meaning to this Court.” *Yeoman v. Commonwealth Health Policy Bd.*, 983 S.W.2d 459, 469 (Ky. 1998). For the citizenry to have confidence that ours is a society governed by the rule of law, not men, the law must have stability and predictability. *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986) (*Stare decisis* “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”).

⁹ Prohibiting the Court of Appeals from disregarding binding precedent “is fundamental and is absolutely necessary in a hierarchical judicial system.” *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986). “If every tier of courts in the judicial hierarchy were free to disregard the decisions of a higher court,” this Court explained, “[t]he result of that course is anarchy.” *Id.* See also *Cabbage Patch Settlement House v. Wheatly*, 987 S.W.2d 784, 786 (Ky. 1999); *Gilbert v. Barkes*, 987 S.W.2d 772, 776 (Ky. 1999); *Elliott v. Commonwealth*, 976 S.W.2d 416, 417 (Ky. 1998).

It has therefore long been the rule in Kentucky that “[a]ppellate courts should follow established precedent unless there is a compelling and urgent reason to depart therefrom which destroys or completely overshadows the policy or purpose established by the precedent.” *Schilling v. Schoenle*, 782 S.W.2d 630, 633 (Ky. 1990).

Unless the need to change the law is compelling, . . . stability in the law is of sufficient importance to require that we not overturn established precedent which itself is based upon a reasonable premise.

Corbin Motor Lodge v. Combs, 740 S.W.2d 944, 946 (Ky. 1987). *Accord Commonwealth v. Blakely*, 223 S.W.3d 107, 109 (Ky. 2007).

Here, there is no “compelling and urgent reason” to overturn the well-settled rule requiring strict compliance with statutory procedures governing appeals from administrative agencies. To the contrary, as this Court has long recognized, there are strong justifications for the “established precedent”:

The right to appeal the decision of an administrative agency to a court is a **matter of legislative grace; therefore, the statutory conditions** for invoking the power of the court to hear such an appeal **are strictly construed.**

Hutchins, 190 S.W.3d at 336-37 (emphasis added).

The doctrine of substantial compliance with the civil rules has no application to statutory deadlines for perfecting administrative appeals. Indeed, the doctrine of substantial compliance with this Court’s rules is itself created by this Court’s rulemaking authority, and is not required by the Constitution. *Bowen*, 887 S.W.2d at 352.¹⁰

¹⁰ Compare *Ready v. Jamison*, 705 S.W.2d 479, 481 (Ky. 1986) with *Foremost Ins. Co. v. Shepard*, 588 S.W.2d 468, 469 (Ky. 1979). In *Foremost*, the appellant argued that the adoption of KY. CONST. § 115 required abandoning strict compliance for substantial compliance in appeals from court decisions. The Supreme Court disagreed, *Foremost*, 588 S.W.2d at 469; but five years later exercised its rulemaking authority and adopted substantial compliance by changing the civil rules. *Ready*, 705 S.W.2d at 481. See CR 73.02(2).

Substantial compliance is therefore inapplicable to statutory deadlines governing appeals from administrative agencies. *Carter*, 689 S.W.2d at 361 (“[W]e find no authority before the court to authorize the doctrine of substantial compliance in a case where the appeal process is statutorily created and implemented”).

The stringent standard for judicial review of decisions by the KPSC is another sound policy reason for strictly construing the statutory deadlines imposed by the General Assembly. The limited judicial review of the decisions of an agency with the expertise of the KPSC should not be a vehicle for delaying the implementation of those decisions, and statutory deadlines must therefore be enforced to insure that such appeals are expeditious, not dilatory. This case illustrates that point.

Despite the standard of judicial review, Plaintiffs’ appeal contested only the sufficiency of the evidence supporting the PSC’s findings of fact that (i) the transmission line is needed, and (ii) the proposed line will not unnecessarily duplicate existing lines. Court of Appeals Brief for Plaintiffs at 16-17. Yet the CPCN was issued only after numerous public hearings and the introduction of hundreds of pages of testimony and exhibits. Clearly, there is ample evidence in the agency’s record to support the deliberative decision of the KPSC.

The standard of appellate review of PSC factual findings and policy determinations is extremely narrow, in deference to the unique expertise of the PSC and the highly technical nature of public utility regulation. Consequently, “the statutes authorizing an appeal from the rulings of the Public Service Commission . . . are materially different from those authorizing appeals from other administrative or quasi-judicial agencies.” *Energy Regulatory Comm’n v. Ky. Power Co.*, 605 S.W.2d 46, 49

(Ky. App. 1980). The standard of review of findings of fact by the PSC requires Plaintiffs to demonstrate that the evidence in the administrative record leaves no room for differences of opinion among reasonable minds. *Boone County Water & Sewer Dist. v. Pub. Serv. Comm'n*, 949 S.W.2d 588 (Ky. 1997). *Accord Ky. Indus. Util. Customers, Inc. v. Ky. Utils. Co.*, 983 S.W.2d 493, 499 (Ky. 1998) (“The [Commission’s] orders can be found unreasonable only if it is determined that the evidence presented leaves no room for difference of opinion among reasonable minds”); *National-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 506, 510 (Ky. App. 1990) (An order of the PSC may be set aside only if it is shown by “clear and convincing proof” that “the evidence leaves no room for a difference of opinion among reasonable minds.”)¹¹ Accordingly, strictly construing statutory deadlines for judicial review of KPSC decisions is sound public policy.

In sum, binding precedent from this Court required the Court of Appeals to apply the rule of strict compliance to the statutory period for perfecting the appeal from the KPSC, and every prior decision of the Court of Appeals had squarely held that the time period may not be enlarged after it has expired. Thus, the Court of Appeals was bound by *stare decisis* to follow and apply those precedents – and it failed to do so. There is no sound reason for this Court to depart from its several, well-reasoned, prior precedents. The decision of the Court of Appeals must therefore be reversed and the judgment of the Franklin Circuit Court reinstated.

¹¹ In the two years during which this appeal has been pending, the Companies have proceeded to construct the transmission line. The Companies have acquired all the necessary easements or legal rights to complete the line except over the property owned by three of the Plaintiffs in this case. In the resulting eminent domain action, those Plaintiffs contended that the mere pendency of this appeal deprived the Companies of their statutory power of eminent domain. The Hardin Circuit Court correctly rejected that argument, and those Plaintiffs’ appeal is presently pending in the Court of Appeals. See Case Nos. 2008-CA-001565, 2008-CA-001566 and 2008-CA-001567.

B. The Court of Appeals' invocation of CR 6.02 is misplaced because the civil rules are inapplicable to appeals from administrative agencies until after the appeal has been perfected in strict compliance with the statute governing the appeal.

This Court has squarely held that “[t]he civil rules do not apply in this type of litigation until after the appeal has been perfected.” *Flood*, 581 S.W.2d at 2.¹² The Court of Appeals’ majority nevertheless said that it had “reviewed our published and unpublished opinions and have found that . . . the relationship between the provisions of KRS 278.420(2) and CR 6.02 has never been carefully considered.” Opinion at 8. The majority opined that the statutory requirement in KRS 278.420(2) that good “cause” must be shown could be deemed to be synonymous with the “excusable neglect” standard for filing tardy proofs of claim in Chapter 11 reorganizations under Bankruptcy Rule 9006(b)(1). Opinion at 8, citing *Pioneer Inv. Servs., Co. v. Brunswick Associated Ltd. Partnership*, 507 U.S. 380 (1993). Relying upon this distinguishable bankruptcy decision – which had not been cited by any party – while ignoring Kentucky precedents directly on point, the majority reasoned “that *excusable neglect* under CR 6.02 equates with *cause shown* under KRS 278.420(2)” Opinion at 10 (italics in original).

But this Court’s precedents make clear that the civil rules apply only after jurisdiction has vested in the circuit court by the appellant perfecting the statutory appeal

¹² See also *Pollitt v. Ky. Unemployment Ins. Comm’n*, 635 S.W.2d 485, 487 (Ky. App. 1982) (“The civil rules do not apply to this type of litigation (appeals from administrative decisions) until after the appeal has been perfected”); *Cabinet for Human Res. v. Holbrook*, 672 S.W.2d 672, 675 (Ky. App. 1984) (“A long line of Kentucky cases have held that where appeal from an administrative agency decision is permitted by statute, the requirements of the statute are mandatory, and a circuit court does not obtain jurisdiction to hear the appeal unless the statutory requirements have been met. The civil rules which would normally permit amendment do not apply to appeals of administrative decisions until after the appeal has been perfected and jurisdiction has attached”). Indeed, CR 1(2) expressly provides that the civil rules do not apply in “statutory proceedings, in which the procedural requirements of the statute shall prevail over any inconsistent procedures set forth in the Rules.”

pursuant to the governing statute. *Flood*, 581 S.W.2d at 2. The failure to timely designate the record is a failure to timely perfect the appeal. *Id.* The Plaintiffs' failure to perfect their appeal by timely designating the record on appeal, as required by the governing statute, deprived the circuit court of jurisdiction to proceed with the appeal; and rendered CR 6.02 totally inapplicable to the dispositive question whether the circuit court was required to dismiss the appeal for lack of jurisdiction.¹³

In sum, it was reversible error for the Court of Appeals to rely upon CR 6.02 to permit a motion for extension of time to be filed after the statutory deadline had passed. Plaintiffs' failure to timely perfect their appeal deprived the Franklin Circuit Court of jurisdiction to consider that motion. Accordingly, the decision of the Court of Appeals must be reversed and the Franklin Circuit Court's dismissal of the appeal must be reinstated.

II. Even if the failure to timely designate the record and to timely request an extension were not a jurisdictional defect, the Court of Appeals misinterpreted Kentucky law and ignored the applicable standard of appellate review to erroneously reverse the circuit court.

A. CR 6.02's "excusable neglect" standard is not synonymous with the "cause" required by strict construction of the statutory procedures.

Even assuming *arguendo* that KRS 278.420(2) authorized the Franklin Circuit Court to enlarge the time period for designating the record after that time period had expired, the standard prescribed by the statute is "where cause is shown," not "excusable neglect." A strictly construed statutory requirement that Plaintiffs must show good "cause" is simply not synonymous with the "excusable neglect" standard for filing tardy proofs of claim in Chapter 11 bankruptcy reorganizations.

¹³ *Pollitt* expressly held that CR 6.02 does not authorize an enlargement of the statutory time period for perfecting an administrative appeal. 635 S.W.2d at 487.

Quite the contrary, under Kentucky law, “good cause” requires “a valid excuse.” *Perry v. Cent. Bank & Trust Co.*, 812 S.W.2d 166, 170 (Ky. App. 1991). “Good cause is not mere inattention on the part of the defendant . . . [or] his attorney” *Tennill v. Talai*, 277 S.W.3d 248, 2009 Ky. LEXIS 25, *3 (Ky. 2009). The Court of Appeals’ majority’s reliance upon *Pioneer’s* criteria for excusing tardy proofs of bankruptcy claims as an authoritative interpretation of the “cause” required by the Kentucky statute governing appeals from the KPSC is – to say the least – misplaced.

If one looked to the Kentucky civil rules for guidance to interpret “cause” as used in KRS 278.420(2), the more analogous rule is CR 73.02(1)(d), because both are jurisdictional prerequisites to perfecting an appeal. CR 73.02(1)(d) requires “a showing of excusable neglect” for an extension of time for filing a notice of appeal from a court decision, and the caselaw construing CR 73.02(1)(d) clearly requires more than inadvertence of the attorney in order to obtain an extension of time for filing a notice of appeal. This Court has squarely held that “a misunderstanding over the filing date is not the type of excusable neglect that would enlarge the time for filing the jurisdictional document after that time expired.” *AK Steel Corp. v. Carico*, 122 S.W.3d 585, 586 (Ky. 2003). *Accord Motors Ins. Corp. v. Fields*, 294 S.W.2d 518 (Ky. 1956) (“We are not prepared to say that the fact that appellant’s counsel was engaged in other litigation that consumed all his time . . . is excusable neglect within the purview of CR 73.02, subsection (1)”). *See also Baker v. Raulie*, 879 F.2d 1396, 1399-1400 (6th Cir. 1989) (while failure to meet a mandatory deadline due to a busy schedule “may well amount to neglect . . . it is not excusable”).

These precedents demonstrate that it was error for the Court of Appeals to apply caselaw interpreting CR 6.02 – much less Bankruptcy Rule 9006(b)(1) – to divine the meaning of “cause” in KRS 278.420(2). Even the phrase “excusable neglect” does not have an immutable definition. As used in CR 73.02(1)(d) – and CR 60.02 – the phrase “excusable neglect” is narrowly construed because of the purpose which those rules serve. The fact that the phrase “excusable neglect” may be leniently construed in other contexts, such as those to which CR 6.02 applies, simply has no relevance to strictly construing the term “cause” in KRS 278.420(2).

This Court has long recognized that mere inadvertence – such as counsel failing to calendar a jurisdictional deadline – will not excuse the failure to timely perfect an appeal. Accordingly, the decision of the Court of Appeals must be reversed, and the Franklin Circuit Court’s dismissal of the appeal must be reinstated.

B. The Court of Appeals ignored the abuse of discretion standard of appellate review that governs this appeal.

Finally, as noted in Judge Moore’s dissenting opinion, the Court of Appeals’ majority opinion totally ignored the standard of appellate review which governed Plaintiffs’ appeal of the Franklin Circuit Court’s dismissal of their appeal. While the majority opinion recited Plaintiffs’ contention “that the circuit court abused its discretion . . . ,” [Opinion at 5], the majority simply decided *de novo* that “[e]xcusable neglect occurred and cause was shown.” Opinion at 10.

But under the abuse of discretion standard which governed this appeal, the question is not whether the appellate judges would have decided that good cause was shown by Plaintiffs. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982) (“However, we must bear in mind that in reviewing the decision of a trial court the test is not whether we

would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion”). Rather, Plaintiffs must demonstrate that Judge Wingate abused his sound discretion when he decided that the attorney’s admitted failure even to docket the deadline on his law office’s tickler calendar was not sufficient “cause.”¹⁴ On the evidence in this record, it cannot be seriously contended that the Franklin Circuit Court abused its discretion when it denied Plaintiffs’ motion to enlarge the time period. For that additional reason, the Court of Appeals’ decision should be reversed and the decision of the Franklin Circuit Court reinstated.

CONCLUSION

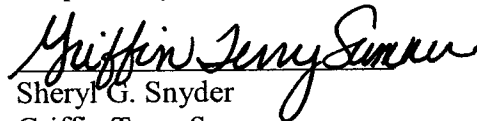
By developing its own rationale *sua sponte*, and relying upon authorities that were not cited by any party, the Court of Appeals’ majority opinion erroneously reversed the Franklin Circuit Court’s dismissal of Plaintiffs’ appeal from the KPSC decision for lack of jurisdiction. The Court of Appeals’ decision was erroneous because: (1) statutory appeals from administrative agencies are still governed by the rule of strict compliance; (2) Plaintiffs’ failure to perfect their appeal by designating the record within the time required by the applicable statute is jurisdictional; (3) the circuit court could not use CR 6.02 to relieve the Plaintiffs from their defalcation because the circuit court no longer had jurisdiction since the appeal had not been perfected; (4) even if the circuit court had jurisdiction to enlarge the time period, the governing standard was strictly construed “cause,” not liberally construed “excusable neglect”; and (5) it was not an abuse of discretion for Judge Wingate to find that Plaintiffs had failed to demonstrate adequate

¹⁴ The lawyer did not plead ignorance of the applicable deadline, perhaps because the same lawyer had previously failed to timely designate the record on an appeal from the KPSC, resulting in dismissal of that appeal for lack of jurisdiction. *See Nuckols Farm*, at 5, attached hereto as Appendix F.

“cause” on the undisputed facts of this case. Any one of those reasons, standing alone, requires reversal of the Court of Appeals’ decision.

Accordingly, Appellants respectfully urge this Court to apply the doctrine of *stare decisis*, and follow this Court’s well-settled precedents by reversing the Court of Appeals’ decision and reinstating the judgment of the Franklin Circuit Court dismissing Plaintiffs’ appeal for lack of jurisdiction.

Respectfully submitted,



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