

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001504-D

JEFF'S AUTO SERVICE, INC.

MOVANT

v. ON MOTION FOR DISCRETIONARY REVIEW
FROM JEFFERSON CIRCUIT COURT
ACTION NO. 05-XX-000054

FARM BUREAU INSURANCE
COMPANY OF INDIANA,
ASO JOHN LAWSON

RESPONDENT

OPINION AND ORDER
DENYING MOTION TO FILE
MOTION FOR DISCRETIONARY REVIEW
OUT OF TIME

** ** * ** * ** *

BEFORE: ACREE, JUDGE; KNOPF AND PAISLEY, SENIOR JUDGES.¹

ACREE, JUDGE: Movant, Jeff's Auto Service, Inc. (Movant), appealed a Default Judgment entered by the Jefferson District Court. The Jefferson Circuit Court affirmed the Default Judgment on June 13, 2006. That ended Movant's appeal as a matter of right.

¹ Senior Judges William L. Knopf and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution and KRS 21.580.

KRS 22A.020(1). Any further appeal would be at the discretion of this Court. KRS 22A.020(5).

The Kentucky Rules of Civil Procedure (CR) govern the time within which Movant was required to file its motion:

A motion for discretionary review by the Court of Appeals of a circuit court judgment in a case appealed from the district court shall be filed within 30 days after the date on which the judgment of the circuit court was entered

CR 76.20(2)(a). If Movant had complied with this Rule, the Motion for Discretionary Review would have been filed on or before July 13, 2006. Movant did not comply with the Rule and the motion was not filed in time.

Movant asks us to remedy this failing. Unfortunately, we have no authority to grant its “Motion to File Out of Time” for two related, but not interdependent, reasons. First, “CR 73.02(2) expressly places timely . . . ‘motions for discretionary review’ in the same category as a ‘notice of appeal,’” *Foxworthy v. Norstam Veneers, Inc.*, 816 S.W.2d 907, 909 fn.2 (Ky. 1991), making the filing of a motion for discretionary review no less a jurisdictional requirement than the filing of a notice of appeal. *See also, Beard v. Commonwealth, ex rel. Shaw*, 891 S.W.2d 382, 382-83 (Ky. 1994). Second, whether or not the timely filing of a motion for discretionary review is jurisdictional, it remains mandatory in that the Civil Rules require automatic dismissal of tardy appeals. *Johnson v. Smith*, 885 S.W.2d 944, 950 (Ky. 1994).² As explained in *Johnson*:

² In state courts nationwide, “the time limit for filing an appeal is generally considered to be mandatory and jurisdictional in both civil and criminal cases.” 5 Am. Jur. 2d *Appellate Review* § 291 (1995 & 2006 Supp.)(Footnotes omitted). “[E]ven in jurisdictions where substantial compliance is sufficient with respect to some procedural steps for appeal, the timely filing of a

A rule requiring automatic dismissal for a tardy appeal in civil cases is necessary to provide finality to the trial court's judgment so that the litigant prevailing at the trial level can then execute on the judgment or otherwise enforce the terms of the final order.

Id.

Movant should not presume that this Court is empowered with plenary authority to extend deadlines contained in our Rules. Such a presumption would be incorrect. We are no less bound by the Rules of Civil Procedure than the parties who come before us. *Electric Plant Bd. of City of Hopkinsville v. Stephens*, 273 S.W.2d 817, 818 (Ky. 1954).

CR 6.02 states in pertinent part:

When . . . by these Rules . . . an act is required . . . to be done at or within a specified time, the court for cause shown may, . . . upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50.02, 52.02, 59.02, 59.04, 59.05, 60.02, 72.02, 73.02 and 74 except to the extent and under the conditions stated in them.

We are mindful that CR 6.02 does not include CR 76.20 within the group of Rules that are excluded from its provisions, but we also note that it does include CR 73.02. That Rule governs initiating procedures in all appeals whether as of right or on the basis of the Court's discretion. It says, in pertinent part:

notice of appeal remains mandatory, and failure to timely file is fatal to the action.” *Id. citing Workers' Compensation Board v. Siler*, 840 S.W.2d 812 (Ky. 1992). This rule applies “regardless of whether the appeal is taken as of right [footnote omitted] or by permission.” *Id.*

The failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial.

CR 73.02(2). By the plain terms of CR 6.02, we cannot suspend that penalty by extending the time for Movant to file its motion for discretionary review, “except to the extent and under the conditions stated in” that Rule. CR 73.02 does contain such an exception. However, that exception will not help this movant. As recently noted by the Supreme Court:

. . . CR 73.02(1)(d) provides the **only basis for enlarging** the period for taking an appeal [either as a matter of right or by the court's discretion] **after the time for doing so expires**. That basis is the failure of the appellant to learn of the entry of the judgment that triggered the time for taking an appeal.

AK Steel Corp. v. Carico, 122 S.W.3d 585, 587 (Ky. 2003)(emphasis added).

As to the timeliness of the filing of a notice of appeal or motion for discretionary review, it remains as strict as it always has been.

A policy of strict compliance governs the time within which an appellant must invoke the court's jurisdiction CR 73.02, embodies a policy choice that a tardy petition for review is subject to automatic dismissal and cannot be saved through application of the doctrine of substantial compliance.

Hutchins v. General Elec. Co., 190 S.W.3d 333, 337 (Ky. 2006); *see also, Harris v.*

Jackson, 192 S.W.3d 297, 301 (Ky. 2006) (“[W]e demand strict adherence to our jurisdictional rules regarding ‘timeliness’”).

The same policy of strict compliance is also articulated in CR 76.20(2) (c) which provides that

[t]he failure of a party to file a Motion for Discretionary Review within the time specified in this Rule, or as extended by a previous order, shall result in a dismissal of the Motion for Discretionary Review.³

Although it appears as *dictum* within the context of *AK Steel, supra*, we note with interest the statement made therein that “the time for invoking the Court’s jurisdiction by filing a motion for discretionary review may be extended before it expires, but the time may not be enlarged after it expires.” *AK Steel*, 122 S.W.3d at 587.

We do not disregard the seriousness of Movant’s underlying claim and we regret, somewhat, that we will not be able to address it. That underlying claim is that Respondent’s counsel lulled Movant’s counsel into inaction by misrepresenting his intended course of conducting the litigation. This resulted, Movant alleges, in his refraining from filing a responsive pleading to the original District Court complaint. The charge was not supported by affidavit nor was it refuted by Respondent. Nevertheless, whether this claim rises to the level of the type of fraud described in *Noel v. City of Madisonville Municipal Housing Com'n*, 279 S.W.2d 790, 793 (Ky. 1955), or constitutes professional misconduct, or is merely an excuse for failing to respond to the complaint, the issue is not within the jurisdiction of this Court.

Furthermore, no matter how compelling the issues framed by this or any motion for discretionary review may be, we cannot ignore, nor can we escape the conclusion, that this Court has no authority to cure the jurisdictional defect occasioned by

³ See 5 William B. Bardenwerper, et al, *Kentucky Practice*, § 63.56 (3d ed. 1991 & 2007 Supp.) (“Pursuant to CR 76.20(2), failure to file a timely motion for discretionary review results in a mandatory dismissal of the appeal.”).

Movant's failure to timely file the motion for discretionary review. *Foremost Ins. Co. v. Shepard*, 588 S.W.2d 468, 469 (Ky. 1979) quoting *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky. 1977)("Substantive rights, even of constitutional magnitude, do not transcend procedural rules[.]").

For the foregoing reasons, the Movant's "Motion to File Out of Time" is DENIED.

ALL CONCUR.

ENTERED: March 30, 2007

/s/ Glenn E. Acree
JUDGE, COURT OF APPEALS

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