

RENDERED: February 6, 1998; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 96-CA-001958-MR

DAVID L. BAKER

APPELLANT

V. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER CRITTENDEN, JUDGE  
CIVIL ACTION NO. 96-CI-000270

COMMONWEALTH OF KENTUCKY,  
TRANSPORTATION CABINET,  
DIVISION OF MOTOR VEHICLE ENFORCEMENT;  
NORRIS E. BECKLEY, Commissioner of the  
Division of Motor Vehicle Enforcement;  
PAUL PERKINS; MARCUS SCHNEPP; and  
WILLIAM WHITE

APPELLEES

OPINION

REVERSING AND REMANDING

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BEFORE: EMBERTON, HUDDLESTON and MILLER, Judges.

HUDDLESTON, JUDGE. David L. Baker is a commissioned law enforcement officer<sup>1</sup> employed by the Kentucky Transportation Cabinet's Department of Vehicle Regulation, Division of Motor Vehicle Enforcement. A trial board found Lieutenant Baker guilty of a violation of MVE's Standards of Conduct arising out of his direct involvement in the theft of a confiscated radar detector from an

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<sup>1</sup> See Ky. Rev. Stat. (KRS) 281.770.

evidence locker. As a consequence, Baker was demoted from lieutenant to MVE officer and his salary was reduced by ten percent.

Baker appealed the trial board's decision to Franklin Circuit Court. MVE moved to dismiss Baker's appeal as untimely arguing that Baker's failure to strictly comply with the statute authorizing an appeal deprived the circuit court of jurisdiction to hear it. Following briefing and argument, the circuit court granted the motion and dismissed the appeal. Upon further appeal to this Court, Baker seeks reinstatement of his circuit court appeal and remand for a decision on the merits.

The first issue to be addressed is whether Baker's appeal was timely filed. The trial board<sup>2</sup> conducted a hearing on February 16, 1996, at the conclusion of which it advised Baker that the charges against him had been sustained and that he would be demoted and his pay reduced by ten percent. On February 29, 1996, a final order containing findings of fact and conclusions of law was rendered and served on Baker. Ten days after the hearing, but three days prior to rendition of the trial board's final order, Baker appealed to Franklin Circuit Court. MVE says that Baker's premature appeal was untimely, thus depriving the circuit court of jurisdiction to entertain it; the circuit court sustained MVE's motion to dismiss on the ground that it lacked jurisdiction to hear the appeal.

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<sup>2</sup> Provision for appointment of a trial board is presently made by KRS 281.772. The current statute is substantially the same as the statute in effect when Baker's case was heard.

The question whether the premature filing of a notice of appeal from an administrative ruling is untimely was answered by the Supreme Court in Johnson v. Smith, Ky., 885 S.W.2d 944 (1994). In Johnson a trial was had on certain issues relating to an inter vivos trust. Within ten days after entry of judgment, some, but not all, of the parties filed a motion for a new trial and a motion to alter or amend the judgment. The filing of those motions "terminated"<sup>3</sup> the time for filing an appeal to the Court of Appeals until thirty days after they were ruled on by the trial court. Ky. R. Civ. Proc. (CR) 73.02(1)(a) and (e). The parties who chose not to file post-judgment motions filed notices of appeal within thirty days following entry of judgment, but at a time when post-judgment motions made by other parties were awaiting a decision by the trial court. The appeal of the parties who had not filed post-judgment motions was dismissed by the Court of Appeals as prematurely filed, and they sought discretionary review in the Supreme Court.

The Supreme Court reversed, holding that the challenged notices of appeal had been timely filed. Writing for the Court, Justice Leibson said that:

Consistent with the policy announced in Ready [v. Jamison], Ky., 705 S.W.2d 479 (1986)], there is no reason why, even assuming these appeals should be deemed

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<sup>3</sup> Ky. R. Civ. Proc. (CR) 73.02(1)(e) provides that: "The running of time for appeal is terminated by a timely motion pursuant to any of the Rules hereinafter enumerated, and the full time for appeal fixed in this Rule [thirty days per CR 73.02(1)(a)] commences to run upon entry and service under Rule 77.04(2) of an order granting or denying a motion under Rules 50.02, 52.02 or 59, except when a new trial is granted under Rule 59."

"premature," this should require dismissal. Whether we decide time runs from the date of judgment, or from overruling of post-judgment motions made by other parties, the notices of appeal filed here put appellees on notice of the intent to appeal before expiration of the thirty day time limit in CR 73.02(1)(a), and thus served the essential purpose of the rule.

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We hold that these movants' notices of appeal were not fatally defective simply because they were filed before the trial court ruled on a post-judgment motion made by other parties. The notices of appeal filed forthwith relate forward to the time when final judgment was entered disposing of post-judgment motions made by others. There is no rule, and no sound judicial policy, forbidding such construction.

Johnson, 885 S.W.2d at 949-950. The same rule prevails in the federal courts. See Firsttier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991).

In conformity with the rule announced in Johnson, we hold that because the premature notice of appeal filed by David Baker relates forward to the issuance of the final order from which his appeal was taken, his appeal to the circuit court was timely.

At the time Baker filed his notice of appeal, a final and appealable order had not been issued by the trial board and a transcript of the hearing before the board was not yet available.

Baker later sought permission to amend his original pleading to supply these deficiencies.<sup>4</sup> The motion was denied by the circuit court, but it should not have been. In Bobinchuck v. Levitch, Ky., 380 S.W.2d 233 (1964), Kentucky's highest court said that:

When a practical impossibility, beyond the control of the appellants, prevents filing of the transcript of evidence [taken at an administrative hearing] in time, the appeal may be perfected by filing the transcript later. In such cases the statute requiring filing of the transcript is directory.

Id. at 236.

Baker coupled his appeal with a multi-count complaint which MVE moved to dismiss on the ground that it fails to state a claim upon which relief can be granted.<sup>5</sup> The complaint alleges (1) that a 1994 legislative change<sup>6</sup> in the disciplinary system constitutes special legislation in cases where a general law can be made applicable and is, therefore, unconstitutional;<sup>7</sup> (2) the powers given the Commissioner of the Division of Motor Vehicle Enforcement

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<sup>4</sup> See KRS 281.773 which outlines the steps that must be taken to perfect an appeal to the circuit court.

<sup>5</sup> CR 12.02(f).

<sup>6</sup> House Bill 531, 1994 Acts Chapter 317, codified as KRS 18A.095, and House Bill 200, 1994 Acts Chapter 405, codified in several statutes, including KRS 18A.095. KRS 18A.095 was further amended in 1996. See Senate Bill 143, 1996 Acts Chapter 318, entitled "**AN ACT relating to procedures for administrative hearings and making changes incidental thereto,**" § 22.

<sup>7</sup> Ky. Const. § 59(29).

by House Bill 531, 1994 Acts Chapter 317, constitute "absolute and arbitrary power" prohibited by Section 2 of the Kentucky Constitution; (3) the disciplinary system prescribed by the General Assembly in 1994<sup>8</sup> violates various undesignated provisions of the United States and Kentucky constitutions; (4) the disciplinary system established by the General Assembly, as applied, violates Baker's due process rights under both federal and state constitutions;<sup>9</sup> and (5) the Commissioner's involvement in the disciplinary process deprived Baker of unspecified privileges and immunities secured by the Constitution of the United States and denied him due process of law, resulting in damage to his reputation and standing in the community. Baker sought a declaration that House Bill 531 is unconstitutional, compensatory damages for violations of his constitutional rights, punitive damages as a result of the alleged malicious and oppressive conduct of the Commissioner, an attorney's fee, and costs. The circuit court sustained MVE's motion to dismiss for failure to state a claim upon which relief can be granted and dismissed Baker's complaint with prejudice. Baker has also appealed from this ruling.

In approaching this issue, we express no opinion as to the merits of the several claims asserted in Baker's complaint. When faced with a motion to dismiss for failure to state a claim upon which relief can be granted, it is neither the province of this Court nor of the circuit court to consider whether a plaintiff

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<sup>8</sup> See n. 6, supra.

<sup>9</sup> See U.S. Const. Amend. XIV § 1; Ky. Const. § 14.

such as Baker can prove his allegations or ultimately prevail. Louisville v. Stock Yards Bank & Trust, Ky., 843 S.W.2d 327 (1992); Kevin Tucker & Assocs. v. Scott & Ridder, Inc., Ky.App., 842 S.W.2d 873 (1992). The complaint should not be dismissed unless it appears that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim. Id. As Kurt A. Philipps, Jr., author of 6 Kentucky Practice 217 (1995), has said: "As a practical matter, a dismissal for failure to state a claim should only be granted where the allegations in the complaint show an insuperable bar to recovery."<sup>10</sup> Applying these principles to the case at hand, we are convinced that Baker's complaint does, in fact, state one or more claims upon which relief can be granted. Accordingly, it should not have been dismissed.

The order dismissing Baker's appeal and his complaint is reversed. This case is remanded to Franklin Circuit Court with directions to permit Baker to file an amended pleading to correct the deficiencies in his initial complaint/appeal and for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul F. Henderson  
Somerset, Kentucky

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<sup>10</sup> Philipps cites as an example a complaint that shows on its face that it is barred by the statute of limitations. See Old Mason's Home of Ky., Inc. v. Mitchell, Ky.App., 892 S.W.2d 304 (1995).

BRIEF FOR APPELLEES  
Edwin A. Logan  
Frankfort, Kentucky