

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002975-MR

EXCEL ENERGY, INC.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN WOODS POTTER, JUDGE
ACTION NO. 95-CI-001090

COMMONWEALTH INSTITUTIONAL SECURITIES, INC.;
R. GENE SMITH; GEORGE LAWSON; AND
GERALD B. BRENZEL

APPELLEES

AND

NO. 1998-CA-003030-MR

R. GENE SMITH

CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN WOODS POTTER, JUDGE
ACTION NO. 95-CI-001090

GEORGE LAWSON

CROSS-APPELLEE

OPINION AND ORDER
DISMISSING APPEAL NO. 1998-CA-002975-MR

* * * * *

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

DYCHE, JUDGE. The Court has considered the motion of appellant, Excel Energy, Inc. (hereinafter "Excel"), for timely filing of appeal No. 1998-CA-002975-MR, the motion of appellee, R. Gene Smith (hereinafter "Smith"), to dismiss the appeal, and the

response to each motion. The Court, being sufficiently advised, ORDERS the motion for timely filing of appeal be DENIED. The motion to dismiss appeal is GRANTED.

The notice of appeal designates an order entered March 25, 1998, and an order entered October 30, 1998. The order of October 30, 1998, includes CR 54.02 language. Pursuant to CR 73.02(1)(a), a notice of appeal must be filed within thirty (30) days after the date of notation of service of the decision appealed from. The Jefferson Circuit Clerk's docket shows that the notation was made on October 30, 1998. Therefore, the last day on which a timely notice of appeal could have been filed was November 30, 1998 (November 29 was a Sunday). The docket shows the notice of appeal was filed on December 1, 1998.

Excel moves this Court to declare that the notice of appeal was timely filed on November 30, 1998. Excel states that the notice of appeal was "file-stamped" on that day through the use of a stamp machine. The notice of appeal was not accompanied by the filing fee, which was eventually paid on December 1, 1998, the date on which the circuit clerk recorded the notice of appeal as filed. It is Excel's contention that the fact the notice of appeal was not entered on the docket by the clerk on November 30, 1998, is irrelevant for purposes of compliance with the Civil Rules and that its notice of appeal was timely filed. Excel relies on Foxworthy v. Norstam Veneers, Inc., Ky., 816 S.W.2d 907 (1991).

Smith disagrees with Excel's interpretation of Foxworthy and points out that, while the case stands for the principle that the policy of substantial compliance may be

applied to the failure to timely pay the filing fee, it did not do away with "the cardinal rule" that the failure to timely file the notice of appeal is fatal to an appeal. Therefore, Smith rejects Excel's contention that the notice of appeal was timely filed by having it "clocked and dropped" near the close of business on November 30, 1998, without the filing fee.

CR 73.02 controls the disposition of this matter. The pertinent portions of that Rule are as follows:

(1) (a) 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).

(b) If an appeal or cross-appeal is from an order or judgment of the circuit court, the filing fee required by Rule 76.42(2)(a)(i) or (ii) shall be paid to the clerk of the circuit court at the time the notice of appeal or cross-appeal is filed, and the notice shall not be docketed or noted as filed until such payment is made.

. . . .

(2) 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. Failure to comply with other rules relating to appeals or motions for discretionary review does not affect the validity of the appeal or motion, but is ground for such action as the appellate court deems appropriate, which may include:
(a) A dismissal of the appeal or denial of the motion for discretionary review, . . .
(Emphasis added.)

Both Excel and Smith refer to the case of Manly v. Manly, Ky., 669 S.W.2d 537 (1984). The issue in that case, which presented a factual situation somewhat similar to the one involved herein, was whether the payment of the filing fee is a condition precedent to the filing of the notice of appeal. Manly

answered that question in the affirmative and squarely based its outcome upon the provisions of CR 73.02(1)(a) and CR 73.02(1)(b), which have essentially remained the same to this date. The Kentucky Supreme Court stated:

The filing of the Notice of Appeal in this case was not timely because, under the Rules, it could not be filed until the filing fee was paid. The Notice was not filed on the 30th day as indicated by the stamp placed on the Notice by the clerk's office. The stamp indicating it was filed on that date is nullity because the clerk had no authority to file the notice, pursuant to CR 73.02(1)(a) until he had collected the filing fee. The filing fee was paid on the 32nd day after entry of Judgment, and the Notice of Appeal was actually filed on that date. It was not timely filed.

Manly at 540.

In Manly, the Supreme Court maintained its mandate of strict compliance with the time limitation for filing a notice of appeal and observed that relief from that policy would require an amendment of the Rule. The "Rule" which the Supreme Court referred to in that case unquestionably is CR 73.02(1)(a)-(b).

In 1985, an amendment to CR 73.02 became effective. However, it pertained to CR 73.02(2), not to CR 73.02(1)(a) or CR 73.02(1)(b). The amendment introduced the concept of substantial compliance with those rules relating to appeals other than those which control the time requirement for filing a notice of appeal, to which strict compliance continues to be applied. The Supreme Court relied on that amendment in Foxworthy to hold that the failure to pay the filing fee for the notice of appeal is not automatically fatal or jurisdictional.

In Foxworthy, the notice of appeal was timely mailed to the Jefferson Circuit Court without the filing fee. It was then not only stamped received but also actually entered on the docket as filed. The deficiency was promptly corrected by counsel for appellant, but not until after expiration of the 30 days provided for in CR 73.02(1)(a). The Supreme Court stated:

The question is what happens when, despite the language in CR 73.02(1)(b) directing the filing fee shall be "paid to the clerk of the circuit court at the time the Notice of Appeal . . . is filed, and the notice shall not be docketed or noted as filed until such payment is made," nevertheless, through inadvertence, the filing fee is not paid in advance, the clerk files the Notice of Appeal anyway, and then the filing fee is paid after the 30 day period for filing a Notice of Appeal has elapsed.

Foxworthy at 908.

It is clear to this Court that the application of the concept of substantial compliance, as incorporated in CR 73.02(2), to the late payment of the filing fee in Foxworthy is entirely based upon the distinct circumstances of that case, and that Foxworthy does not establish that the time when the filing fee is paid has lost relevancy under any set of facts. In Foxworthy, there would have been ample time left to correct the deficiency in a timely fashion were it not for the error made by the circuit clerk of filing the notice of appeal in violation of CR 73.02(1)(b), thereby allowing the appellant to rely on the mistaken belief that it had strictly complied with CR 73.02(1)(a) until after its time frame had expired.

These are not the facts of the case sub judice. The notice of appeal was dropped at the clerk's office without the

filing fee on the very last day that it could have been filed. It was not filed on that day and could not have been filed, due to the operation of CR 73.02(1)(b). Contrary to Excel's contention, that is the key factor to resolve this controversy. Foxworthy merely established that the failure to pay the filing fee is no longer automatically fatal to an appeal. It did not alter the requirement that the notice of appeal be timely filed and, thus, did not eliminate the possibility that, in some cases, the failure to timely pay the filing fee could result in an untimely filing of the notice of appeal. Unfortunately, this is one of those cases and we have to conclude that Excel's failure to timely pay the filing fee cannot be cured and is fatal to its appeal.

Based on the foregoing, it is ORDERED that appeal No. 1998-CA-002975-MR be DISMISSED. The notice of cross-appeal was timely filed on December 9, 1998, and, therefore, the cross-appeal shall proceed.

ALL CONCUR.

ENTERED: February 26, 1999

/s/ R. W. Dyché
JUDGE, COURT OF APPEALS

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