RENDERED: AUGUST 16, 2013; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001956-MR

BRIDGETT WRIGHT — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA SUMME, JUDGE
ACTION NO. 09-CI-03566

RUSSELL A. SWIGART; ECOLAB, INC.;
MEDICAL COMPANY, INC.; AND OR
SOLUTIONS, INC. — APPELLEES

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: MAZE, NICKELL, AND THOMPSON, JUDGES.

MAZE, JUDGE: By separate order entered this date, the Court denied appellant's motion to reconsider our previous order dismissing her appeal as interlocutory. However, in order to address arguments advanced in the motion to reconsider and to clarify the order dismissing, the Court on its own motion has elected to modify

the order of dismissal by substituting this opinion and order for the order previously entered.

In dismissing this appeal as interlocutory, the Court cited as precedent this Court's opinion in *Copass v. Monroe County Medical Foundation, Inc.*, 900 S.W.2d 617 (Ky. App. 1995). Upon further consideration, we concede that the language which we cited from *Copass* is dicta and is not controlling authority. However, that language accurately states the law concerning the application of the *nunc pro tunc* rule. Furthermore, the principles discussed in *Copass* would not preclude the application of the relation-forward doctrine. Nevertheless, we conclude that the relation-forward doctrine does not apply in this case because Wright filed a notice of appeal from a clearly interlocutory order. Therefore, for the reasons that follow, we hold that Wright's appeal must be dismissed as interlocutory.

In the matter below, Wright brought suit against the Appellee Russell A. Swigart and three corporations. On August 31, 2012, the circuit court entered a summary judgment dismissing the corporate defendants, but Wright's claims against Swigart were not affected. The trial court issued an order denying Wright's CR 59.05 motion on October 22, 2012. However, neither order contained finality language as required by CR 54.02.

On November 9, 2012, Wright filed a Notice of Appeal naming Swigart and the three corporate defendants as Appellees. On December 17, the Appellees filed a motion to dismiss with this Court, noting that the appeal had not

been taken from a final and appealable order. While we do not have the circuit court record, it appears that Wright moved the trial court for entry of an amended order granting finality. The trial court entered a *nunc pro tunc* order on December 20 which included the necessary finality language. Appellees moved to dismiss this appeal alleging that the December 20 order could not retroactively grant finality to a non-final order.

In *Copass*, the plaintiffs filed suit for medical negligence in Jefferson County, even though the negligent acts occurred in Monroe County. Two of the defendants filed motions to dismiss for improper venue. The trial court granted the motions. Thereafter, on March 14, 1994, the trial court denied the motion to alter, amend, or vacate the dismissal of those two defendants. As further set out in the opinion:

> The Copasses filed a notice of appeal with this Court on April 14, 1994. This Court ordered the Copasses to show cause why the appeal should not be dismissed as having been taken from an interlocutory judgment, in that the trial court's previous order did not contain the recitation of finality required in CR 54.02. Thereafter, the trial court entered an order *nunc pro tunc* adding the finality language of CR 54.02. However, this Court dismissed the appeal, reasoning that "a *nunc pro tunc* order cannot retroactively vest finality upon a judgment which was interlocutory when the notice of appeal herein was filed." The Copasses filed a new notice of appeal from the trial court's corrected order.

Id. at 619.

It appears that this Court has applied the above-quoted language as a basis for dismissal in a number of unpublished opinions and orders. However, this

discussion is not part of the substantive holding of the *Copass* decision. Rather, it is merely a recitation of the procedural history of the first appeal. As such, this language is not authoritative, although it may be persuasive or entitled to respect. *See Cawood v. Hensley*, 247 S.W.2d 27, 29 (Ky. 1952), and *Board of Claims of Kentucky v. Banks*, 31 S.W.3d 436, 439 n.3 (Ky. App. 2000).

However, the discussion in *Copass* is correct insofar as applies the *nunc pro tunc* rule. The purpose of the rule is to record some act of the court done at a former time which was not carried into the record. The power of the court to make such entries is restricted to placing into the record evidence of judicial action which has been actually taken. It may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken. Hence, a court in entering a judgment *nunc pro tunc* has no power to construe what the judgment means, but only to enter of record such judgment as had been formerly rendered, but which had not been entered of record as rendered. *Carroll v. Carroll*, 338 S.W.2d 694 (Ky. 1960). *See also Powell v. Blevins*, 365 S.W.2d 104, 106 (Ky. 1963); *James v. Hillerich & Bradsby Co.*, 299 S.W.2d 92, 94 (Ky. 1956); *Benton v. King*, 199 Ky. 307, 250 S.W. 1002, 1003 (1923).

Moreover, the *nunc pro tunc* rule cannot be used to make an order that it might or should have made. *Hankins v. Hankins' Adm'r*, 173 Ky. 475, 191 S.W. 258 (1917). Consequently, the *Copass* opinion correctly states that the *nunc pro tunc* rule cannot be used to retroactively grant finality to an order which was not

originally designated as final. But the inapplicability of the *nunc pro tunc* rule does not always require dismissal of an appeal from a non-final order.

In his prior dissent to the prior order dismissing the appeal, and in his dissent to this opinion, Judge Thompson discusses the application of the relation-forward rule to a premature filing of a notice of appeal. This rule is separate and distinct from the *nunc pro tunc* rule. In *Johnson v. Smith*, 885 S.W.2d 944 (Ky. 1994), the Kentucky Supreme Court explained that a premature notice of appeal will be deemed to relate forward to the date when finality attaches. *Id.* at 947-48. This rule has been applied recently by the Kentucky Supreme Court in *James v. James*, 313 S.W.3d 17 (Ky. 2010), by this Court in *N.L. v. W.F.*, 368 S.W.3d 136 (Ky. App. 2012), and in a number of unpublished opinions.

But in *Johnson*, the trial court's original summary judgment contained the finality language required by CR 54.02. The appellate issue arose because another party had filed a timely CR 59.05 motion before the filing of the notice of appeal. As a result, the previously final judgment was converted into an interlocutory judgment until the trial court ruled on the motion to reconsider. Once the trial court denied the motion, the judgment again became final and the time for filing a notice of appeal commenced. The Court's application of the relation-forward rule simply allowed the prematurely-filed notice of appeal to be effective as of the date it should have been filed, rather than requiring dismissal of the first appeal and filing of a new notice of appeal.

In applying this rule, the Court in *Johnson* pointed out that the purpose of CR 73.02(1) is to "put appellees on notice of the intent to appeal *before* expiration of the thirty day time limit in CR 73.02(1)(a) . . . ." *Johnson*, 885 S.W.2d at 949. Under the particular circumstances of that case, the Court concluded a litigant could have mistakenly believed that a final judgment had been entered. Since the trial court's non-final order would be appealable if followed by the formal entry of judgment, the Court concluded that it would not be unreasonable to file a notice of appeal prematurely and the appeal should not be dismissed solely on this basis. *Id.* But in a footnote, the Court cautioned that the relation-forward rule does not permit the filing of a notice of appeal from a clearly interlocutory decision. *Id.* at 950, n.1, *citing FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269, 275, 111 S. Ct. 648, 652, 112 L. Ed. 2d 743 (1991).

We would also note the 2009 amendment to CR 73.02(1)(e), which specifically addresses the application of the relation-forward rule:

> e) The running of the 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 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.
>
> > (i) If a party files a notice of appeal after the date of the docket notation of service of the judgment required by CR 77.04(2), but before disposition of any of the motions listed in this rule, the notice of

> appeal becomes effective when an order disposing of the last such remaining motion is entered.
>
> (ii) A party intending to challenge a post-judgment order listed in this rule, or a judgment altered or amended upon such motion, must file a notice of appeal, or an amended notice of appeal, within the time prescribed by this rule measured by the date of the CR 77.04(2) docket notation regarding service of the order disposing of the last such remaining motion.
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> (iii) No additional fee is required to file an amended notice.

Under the clear language of the rule, the relation-forward doctrine only applies where a final judgment was made interlocutory through the intervening filing of a post-judgment motion. Consistent with this rule, *Johnson* and the other cases cited in Wright's motion for reconsideration and in the dissent each involved this type of situation. Wright's appeal, on the other hand, involves a different situation.

The trial court's original summary judgment order of August 31 and its October 22 order denying the motion to reconsider only disposed of the claims against the corporate defendants and did not resolve the claims against Swigart. In this situation, CR 54.02(1) requires the inclusion of finality language before the matter may be appealable. This requirement of CR 54.02(1) is mandatory, and in the absence thereof "the order is interlocutory and subject to modification and correction before becoming a final and appealable judgment or order." *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005).

In the absence of the CR 54.02 language, these orders were clearly interlocutory. Under these circumstances, Wright could not reasonably believe that these orders were final and appealable at the time she filed her notice of appeal. Therefore, her November 9 Notice of Appeal cannot relate forward to the trial court's December 20 order granting finality.

We would agree that this is an area of law which could use some clarification. In addition, a good case could be made for extending the relation-forward rule to the facts of the current case. Although the August 31 and October 22 orders were clearly interlocutory, they were made final without modification by the trial court's December 20 order granting finality. While the December 20 order cannot retroactively grant finality to the prior orders, there is no compelling reason why the prematurely-filed notice of appeal should not relate forward to the entry of the order granting finality. Under these facts, the filing of a new notice of appeal would appear to be a mere formality rather than a bar to consideration of Wright's appeal on the merits. We also agree with the dissent that cases generally should be decided on the merits, and that appellate rights should not be lost based upon technical errors in filing a notice of appeal.

We would invite the Kentucky Supreme Court to address this matter, either by amendment of the Civil Rules or by interpretation of existing rules in a published opinion. But in light of the limited application of the relation-forward rule under the existing Kentucky authority and the current version of CR

73.02(1)(e), we must conclude that the rule is not currently applicable under the facts of this case. Consequently, this appeal must be dismissed.

NICKELL, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ENTERED: August 16, 2013 /s/ Irv Maze
JUDGE, COURT OF APPEALS

THOMPSON, JUDGE: Respectfully, I dissent. I cannot agree with the majority that this appeal must be dismissed as premature after the judgment was made final by the circuit court's *nunc pro tunc* order. I write this dissent because of the importance of the issue presented to the basic function of this Court to decide a case on its merits and this Court's repeated erroneous dismissal of premature appeals. I believe there is controlling authority on the subject from our Supreme Court but because members of this Court have taken inconsistent views, I also invite our Supreme Court to further clarify the law so that it is not continued to be misunderstood. With that invitation extended, I express my interpretation of the law in this Commonwealth.

Although the majority recognizes that the language in *Copass v. Monroe County Medical Foundation, Inc*., 900 S.W.2d 617 (Ky.App. 1995), relied on by the motion panel in this case, was merely a recitation of the procedural history of

the case and not substantively authoritative, it nevertheless concludes that it is persuasive and resurrects the error made by the motion panel by relying on that same language. The majority and other panels of this Court appear to take the view that because the prior appeal was dismissed in *Copass*, the dismissal was legally correct. I am unable to follow the logic that the procedural history in *Copass* is remotely persuasive to the issue presented. Instead, I rely on the substantive holdings of our Supreme Court addressing the application of the rule of relation forward to premature appeals.

To clarify, the trial court's *nunc pro tunc* order contained the finality language required in CR 54.02 and, therefore, we are not dealing with an appeal from an interlocutory order but, instead, with a prematurely filed notice of appeal. Although there may be some procedural differences between this case and *Johnson v. Smith,* 885 S.W.2d 944 (Ky. 1994), our Supreme Court held that a notice of appeal relates forward to the time when a final judgment is entered.

Following the federal courts, in *Johnson*, our Supreme Court adopted the rule of relation forward. *Id.* at 950. Consistent with the substantial compliance doctrine, the Court emphasized that a premature appeal does not harm the opposing party who has notice of the intent to appeal before the expiration of the thirty-day time limit in CR 73.02(1)(a). *Id*. Moreover, the Supreme Court specifically held that the Court of Appeals erred when it stated that the filing of a notice of appeal is a matter of jurisdiction. To emphasize my point, I quote the Court's reasoning and holding at length:

> To be precise, losing litigants are constitutionally vested with a right of appeal and appellate courts are constitutionally vested with jurisdiction. Strictly speaking, the notice of appeal is *not* jurisdictional. It is a procedural device prescribed by the rules of the court by which a litigant may invoke the exercise of the inherent jurisdiction of the court as constitutionally delegated. This is why CR 73.02(2) describes automatic dismissal as the penalty for failure of a party to file a timely notice of appeal, but not as a lack of jurisdiction.
>
> If it were otherwise, the rules could not be changed except by constitutional amendment. This Court has the power to deny or dismiss an appeal if the rules are not followed, based on its own rules, but no power to create or deny jurisdiction. The battle between strict compliance with the rules of appellate practice to avoid dismissal ... is now over. Excepting for tardy appeals and the naming of indispensable parties, we follow a rule of substantial compliance.

Id. at 949-50.

The rule of relation forward was again invoked in *Board of Regents of Western Kentucky University v. Clark,* 276 S.W.3d 819 (Ky. 2009), a condemnation case where the notice of appeal was filed prior to the expiration of the time for the filing of exceptions. *Id.* at 820-821. Although the appeal was from an interlocutory judgment, the Court relied on *Johnson* and held that the notice of appeal related forward to the time when the trial court's interlocutory judgment became final and could properly be heard and decided by the appellate court. *Id.* at 821.

In *James v. James,* 313 S.W.3d 17 (Ky. 2010), our Supreme Court reinforced its adherence to the rule of relation forward. Appellant filed a late

notice of appeal and a motion to extend the time to file an appeal pursuant to CR 73.02(1)(d) based on excusable neglect, which was granted. This Court held that appellant had to file a new notice of appeal within ten days of the order granting the CR 73.02(1)(d) motion. Our Supreme Court rhetorically asked, "why and what for?" *Id*. at 25. Emphasizing that the rule of relation forward is one based on common sense, the Court found no logic for such a rule and held: "[I]f an otherwise appropriate notice of appeal is filed as to an order or judgment of a trial court and it appears otherwise reasonable under the circumstances, precedents, and the rules of procedure applicable to have done so, the notice of appeal may operate prospectively." *Id.*

In *N.L. v. W.F.*, 368 S.W.3d 136, 143 (Ky.App. 2012), our Court agreed that even though the order appealed from was inherently interlocutory, that did not mean the appeal should be dismissed. The Court relied on *James* and CR 73.02(1) in determining that the notice of appeal was "simply premature" and related forward to the entry of the final order. *N.L.*, 368 S.W.3d at 143-145.

I can discern no reason why the same reasoning should not apply where a judgment is made final and appealable by a *nunc pro tunc* order. The majority of the federal courts addressing the issue have held that the rule of relation forward applies when the judgment or order is made final by a *nunc pro tunc* order. *See Good v. Ohio Edison Co.,* 104 F.3d 93, 95 (6th Cir. 1997). I believe our Supreme Court, in adopting the federal relation forward rule, is in agreement with the federal view.

Again, this Court has ignored the Supreme Court's directive and dismissed this appeal. I ask the same question posed by our Supreme Court in *James* when considering dismissal of a premature appeal: "[W]hy and what for?" *James*, 313 S.W.3d 25.

Numerous unpublished decisions of our Court have decided this issue on opposite extremes. The consequences of the majority opinion are that the merits of this appeal will never be decided because the good faith effort by the trial judge to enter a *nunc pro tunc* order to correct the deficiency in the original judgment has now caused the deadline for filing a notice of appeal from that *nunc pro tunc* order to expire. Further, legal negligence actions may be filed against attorneys who have made a good faith effort to file appeals.

I would decide this appeal on its merits.

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