

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-000703-DR

CARLOS GRESHAM  
A/K/A CARLOS JONES; AND  
AM AUTO, LLC

APPELLANTS

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE  
ACTION NO. 12-XX-000119

BRENDA CLARK

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: ACREE, CHIEF JUDGE; JONES AND J. LAMBERT, JUDGES.

JONES, JUDGE: This appeal is before us on discretionary review from the Jefferson Circuit Court. On appeal, we are asked to decide whether the circuit court violated the substantial compliance doctrine when it dismissed an otherwise timely filed district court appeal on the basis that the entire filing fee was not paid

until after expiration of the appeal time. For the reasons more fully explained below, we REVERSE and REMAND.

### **I. BACKGROUND**

On August 15, 2012, Brenda Clark filed a small claims complaint against Carlos Jones<sup>1</sup> and AM Auto, LLC, (hereinafter collectively referred to as "AM Auto"), in Jefferson Circuit Court. Clark alleged in her complaint that she paid AM Auto for automobile repair work that was never performed; Clark sought damages in the amount of \$2,500. On October 4, 2012, the parties appeared before the district court. On the same day, after hearing the proof, the district court entered a judgment in Clark's favor for \$1,700 and costs of \$73.25.

On October 15, 2012, with the assistance of counsel, AM Auto filed a notice of appeal with the district court along with a check for \$74.00. Because October 15th was a judicial furlough day, counsel filed the appeal by "clock and drop," whereby parties are permitted to mechanically date stamp their filings and then drop them in the appropriate basket in the Clerk's Office. Two days later, the clerk notified AM Auto's counsel that the filing fee was \$6.00 short. That same day, AM Auto's counsel tendered the remaining \$6.00 to the clerk's "video office." However, no money was owed to the video office; therefore, the payment was not processed. Due to additional miscommunication within counsel's office, the full \$80 filing fee was not paid until November 7, 2012. On that date, the district court transmitted the file to the circuit court. The circuit court assigned an appeal

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<sup>1</sup> Judge Allison Jones is of no relation to Carlos Jones.

number, stamped the docket sheet, and placed a handwritten notation on the docket sheet stating "notice of appeal clocked in 10-15-12, \$80.00 filing fee not paid until 11-7-12."

Despite the notation, a review of the district court's docket sheet shows that prior to transmittal to the circuit court, a district court clerk made two docket entries for October 15, 2012--an entry of appearance for AM Auto's counsel and a notice of appeal. The docket sheet also indicates that the district clerk issued a "receipt" on October 17, 2012.

Clark subsequently moved to dismiss AM Auto's appeal as untimely. After conducting a hearing, the circuit court granted Clark's motion. Relying on *Excel Energy, Inc., v. Commonwealth Inst. Securities, Inc.*, 37 S.W.3d 713 (Ky. 2001), and *Northwest Bank Minnesota, N.A. v. Hurley*, 103 S.W.3d 21 (Ky. 2003), the circuit court concluded that dismissal of the appeal was required "because the clerk did not file it until remittance of complete payment on November 7, 2012." AM Auto moved the circuit court to reconsider its dismissal. The circuit court denied AM Auto's motion and concluded as follows:

After review of the entire framework of the rules relating to appeals and to the applicable case law, this Court cannot allow the appeal to proceed. While this Court is sympathetic to the seemingly honest mistake which led to the late filing, there is no way around the clear letter of the law which calls for timely filing plus all fees and associated costs be paid in full at the time that the appeal is noticed. CR 73.02 ties a court's hands as to the course of action required and mandates the motion before this Court be denied.

(R. at 37).

AM Auto then petitioned this Court for discretionary review of the circuit court's opinion, which we granted.

## II. ANALYSIS

We begin with Kentucky Rules of Civil Procedure ("CR") 73.01. It states that "all appeals shall be taken to the next higher court by filing a notice of appeal in the court from which the appeal is taken." CR 72 specifically governs the appeal of matters from district court to circuit court. *See* CR 72.01. CR 72.02(1) provides that "[a]ppeals from district court to the circuit court in civil cases shall be taken by filing a notice of appeal in the district court and paying the required filing fee." The time for filing an appeal from the small claims division of district court to circuit court is ten days. CR 72.02(3).

CR 73.02(1)(c) specifically governs payment of the filing fee and docketing of the appeal. It states:

If an appeal or cross-appeal is from an order or judgment of the district court, the filing fee required by KRS 23A.210 or 23A.205(1) shall be paid to the clerk of the district 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.

*Id.* After filing the notice of appeal, the clerk must "serve notice of its filing by mailing a copy of the official docket sheet showing the date filed to the clerk of the appellate court and to the attorney of record of each party or to the party, if unrepresented." CR 73.03(2). The clerk of the lower court must then "note in the

civil docket the names of the parties mailed the copies, with the date of mailing."

*Id.* The clerk's failure to comply with this provision does not affect the validity of the appeal. *Id.*

We begin our analysis with the *Excel Energy* case, on which the circuit court relied heavily in dismissing AM Auto's appeal. In *Excel Energy*, the appellant, like AM Auto, used the "clock and drop" method to tender its notice of appeal to the Jefferson Circuit Court on the last day it was due. *Excel Energy*, 37 S.W.3d at 715-16. However, the appellant did not include the filing fee with the appeal. The next day, the clerk, upon reviewing the notice and finding no filing fee, notified counsel of the deficiency. *Id.* The clerk "refused to note on the docket sheet that the notice of appeal had been filed until the filing fee was paid." *Id.* Excel's counsel promptly tendered the filing fee; the clerk then duly docketed the notice of appeal and noted it as being filed on the date of the payment, which was one day late under the rules. *Id.* The Kentucky Supreme Court ultimately held that "a tardy notice of appeal is subject to automatic dismissal and cannot be saved through application of the doctrine of substantial compliance, is a policy decision that is reflected in CR 73.02." *Id.* at 717. In reaching this result, the *Excel* Court was careful to point out that the clerk had not filed Excel's notice until the fee was paid, which was an entirely different situation than its predecessor court had encountered in *Foxworthy v. Norstam Veneers, Inc.*, 816 S.W.2d 907 (Ky. 1991).

In *Foxworthy*, the appellant mailed its notice of appeal from Lexington, Kentucky, to the Clerk of the Jefferson Circuit Court, but failed to include payment of the filing fee. *Id.* The Jefferson Circuit Court Clerk noted on the docket sheet the notice of appeal as being filed on the same day it was received. *Id.* at 908. When the appellant's counsel discovered the mistake, he promptly notified the Jefferson Circuit Court Clerk and tendered payment for the filing fee. *Id.* However, by then, more than thirty days had elapsed since the entry of judgment in the underlying case. *Id.* The *Foxworthy* Court applied the doctrine of substantial compliance and held that failure to timely pay a filing fee was neither automatically fatal nor a jurisdictional prerequisite to filing a notice of appeal. *Id.* at 910.

The Supreme Court faced a similar scenario more recently in *Hurley*, 103 S.W.3d at 21. Therein, the appellant tendered a timely notice of appeal along with an unsigned check. *Id.* at 22. The circuit clerk docketed the notice, but informed counsel that the check was being returned for a signature. *Id.* Counsel made prompt payment with a signed check, but it was after the time for filing an appeal had expired. In reliance on *Excel*, the Court of Appeals dismissed the appeal. *Id.* The Supreme Court reversed holding that the situation was more akin to *Foxworthy* than *Excel* because the clerk docketed the appeal on the day it was filed. *Id.* at 23-24.

The circuit court determined that the case at hand is more akin to *Excel* and *Hurley* than to *Foxworthy*. In so doing, the circuit court placed great

emphasis on the handwritten notation the circuit court placed on the docket sheet after it received the original file from district court. This notation states that the notice of appeal was "clocked in on 10-15-12 [but] \$80.00 filing fee not paid until 11-7-12." Based on this notation, the circuit court concluded that AM Auto's notice of appeal was not filed until November 7, 2012, when it paid the full filing fee.

The handwritten notation, however, does not change the fact that the district court's docket sheet plainly shows that notice of appeal was docketed by the district clerk as having been filed on October 15, 2012. The fact that the district court did not transmit the file to circuit court until full payment was received cannot erase that entry. Moreover, the circuit clerk's handwritten notation regarding the filing and payment dates cannot override the district clerk's docket entry because the rules clearly place the responsibility for docketing the notice of appeal on the district court, not the circuit court. *See* CR 72.02(1); 73.02(1). The circuit clerk did not have the authority to "file" the notice of appeal as that authority belonged only to the district clerk. Accordingly, the circuit clerk's handwritten notation is of no consequence.

Having carefully reviewed the record, we can find nothing that would effectively distinguish this case from *Foxworthy* and *Hurley*. Accordingly, we conclude that the circuit court erred when it refused to apply the substantial compliance doctrine and instead dismissed AM Auto's appeal.

### III. CONCLUSION

For the reasons set forth above, we reverse and remand this appeal Jefferson Circuit Court for adjudication on the merits.

J. LAMBERT, JUDGE, CONCURS

ACREE, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, CHIEF JUDGE, DISSENTING: Respectfully, I dissent.

The majority states that “[o]n October 15, 2012, [Appellant] *filed* a notice of appeal with the district court” and tendered a check in an amount less than required. (Emphasis added). My first concern is that “[t]here is no local rule in Jefferson County that allows a party to *file* a notice of appeal via the ‘clock and drop’ procedure.” *Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc.*, 37 S.W.3d 713, 716 (Ky. 2000), *as modified on denial of reh'g* (Mar. 22, 2001). Because “[t]he ‘clock and drop’ procedure in Jefferson County was not established to facilitate the filing of notices of appeal[,]” *id.*, we should not here hold that the notice of appeal was filed on October 15, 2012.

Furthermore, if, as is the case here, “an appeal . . . is from an order or judgment of the district court, the filing fee . . . shall be paid to the clerk of the district court . . . and the notice shall not be docketed or noted as filed until such payment is made.” CR 73.02(1)(c). Even if we presume, contrary to *Excel Energy*, that the “clock and drop” procedure allowed for the filing of notices of appeal, this rule would prohibit everyone – clerks, parties, and attorneys – from using that procedure until the proper fee was paid.



For these reasons, I respectfully dissent. I would affirm the circuit court's judgment on the basis of *Excel Energy* and CR 73.02(1)(c).

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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