

# Supreme Court of Kentucky

2024-SC-0405-D

BARRY SATURDAY, ON HIS OWN  
BEHALF AND ON BEHALF OF HIS  
VULNERABLE FATHER,  
DR. MICHAEL F. STEPHENS

MOVANT

V.

ON REVIEW FROM COURT OF APPEALS  
NO. 2024-CA-0268  
FAYETTE CIRCUIT COURT NOS.  
23-H-00737-001, 23-H-737, & 23-XX-00036

COMMONWEALTH OF KENTUCKY,  
ET AL.

RESPONDENTS

## **OPINION AND ORDER**

Following an unsuccessful attempt to bypass the Court of Appeals by filing a motion for discretionary review in this Court from an order of the Fayette Circuit Court,<sup>1</sup> Movant Barry Saturday filed an untimely motion for discretionary review in the Court of Appeals. The Court of Appeals denied his motion for additional time to file the motion for discretionary review and dismissed the case. Movant then filed a motion to reconsider the dismissal, which the Court of Appeals denied on July 23, 2024.

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<sup>1</sup> The Fayette Circuit Court was sitting as an appellate court reviewing a guardianship order entered by the Fayette District Court.

Pursuant to RAP<sup>2</sup> 44(B)(2), Movant had thirty days, or until August 22, 2024, in which to seek discretionary review of the adverse decision from this Court. Service requirements relating to timely filings are set forth in RAP 5(E), which states:

To be timely filed, a document shall be received by the clerk of the court in which the appeal is pending within the time specified for filing. Any document filed with the Clerk of the Supreme Court of Kentucky or Kentucky Court of Appeals shall be deemed timely filed if it has been transmitted by United States registered (not certified) or express mail, or by other recognized mail carriers, with the date the transmitting agency received said document from the sender noted by the transmitting agency on the outside of the container used for transmitting, within the time allowed for filing, or by any other method allowed by court rule or order.

This Court received Movant's motion for discretionary review by way of United States Postal Service certified mail on August 26, 2024, outside the Rule's thirty-day timeframe. Under RAP 5(E), the filing was untimely because it was received beyond the filing deadline after having been improperly transmitted on or before the due date by certified mail rather than the Rule's plainly mandated express or registered mail. While it is undisputed Movant posted the motion by certified mail on August 22, 2024, the last day for timely transmission, this fact is immaterial because appellate procedural rules have not sanctioned certified mail as an effectual mailing service to establish timely filing since 1985, a period of almost forty years.<sup>3</sup>

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<sup>2</sup> Rules of Appellate Procedure.

<sup>3</sup> When enacted in 1978, former Civil Rule 76.40 permitted pleadings to be considered timely filed if they were transmitted by registered or certified mail with sufficient time to reach the appropriate clerk's office but were delayed in transit. The language of the Rule was modified in 1982 and 1984 relative to the date on which a pleading could be sent by registered or certified mail to be considered timely. In 1985, certified mail was removed from the Rule and replaced

Upon being notified of the tardiness of his motion for discretionary review, Movant filed a document styled “Motion to Verify Timeliness.” Because no such form of relief or procedural mechanism exists, the request was docketed as a motion for an enlargement of time. Movant subsequently filed a “Motion to Redocket Prior Motion” to explain he was not, in fact, requesting an enlargement of time. No response to Movant’s motions has been filed.

Close inspection of Movant’s motion reveals it is essentially a request to reconsider the untimeliness of his motion for discretionary review. In support, Movant argues he substantially complied with the mailing requirements of RAP 5(E) because the final sentence of the Rule allows for “any other method” of delivery to be deemed permissible by the Court. Movant contends this language would encompass certified mail. However, because the Rule specifically excludes certified mail as a viable option for timely service, Movant’s utilization of the expressly prohibited transmission method cannot logically constitute substantial compliance.

Further, the filing of a timely motion for discretionary review is jurisdictional and “the doctrine of substantial compliance . . . only applies to defects that are nonjurisdictional in nature.” *Beard v. Com. ex rel. Shaw*, 891 S.W.2d 382, 383 (Ky. 1994) (citing *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990), *superseded by rule as stated in Mahl v. Mahl*, 671 S.W.3d

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by express mail. The Rule was modified again in 1993 to clarify and expressly prohibit transmission by certified mail as an appropriate method to establish timeliness of a late-received pleading. RAP 5(E) replaced CR 76.40 effective January 1, 2023, and retained the prohibition on using certified mail.

140 (Ky. 2023)); *see also* RAP 10(B) (“A party’s failure to take any step other than the timely filing of a notice of appeal, cross-appeal, or motion for discretionary review does not affect the validity of the appeal or other proceeding in an appellate court.”); *Cab. for Health and Fam. Svcs. v. D.W.*, 680 S.W.3d 856, 860 (Ky. 2023) (“There is no substantial compliance rule with timely filing a notice of appeal, and the mandatory application of the rule applies ‘even when the appealing party makes a good faith effort to file the notice of appeal.’”). Thus, Movant’s motion for discretionary review was untimely and this Court’s jurisdiction was not properly invoked.

Having considered Movant’s “Motion to Verify Timeliness” which we have treated as a motion for enlargement of time to file a motion for discretionary review, and being otherwise sufficiently advised, the Court ORDERS the motion be, and it is hereby, DENIED. We further ORDER Movant’s “Motion to Redocket Prior Motion” be hereby DENIED as Moot. Therefore, this appeal must be, and it is hereby, DISMISSED from the Court’s active docket.

All sitting. VanMeter, C.J.; Bisig, Conley, Keller and Nickell, JJ., concur. Thompson, J., dissents by separate opinion in which Lambert, J., joins.

THOMPSON, J., DISSENTING. Respectfully, I disagree with the majority’s conclusion that it is mandatory that this Court dismiss Barry Saturday’s *pro se* motion without any review of the record or consideration of underlying merits of his petition. In this instance, Saturday’s mailing contained verifiable proof that he had in fact tendered his motion to the United States Postal Service (USPS) in a timely manner which satisfied the underlying purpose for Kentucky

Rules of Appellate Procedure (RAP) (5)(E)'s requirement of using only registered or express mail.

On Thursday, August 22, 2024, Saturday went to the Bluegrass Station office of the United States Postal Service (USPS) in Lexington and mailed his motion to this Court. If he had done so using express mail or registered mail as directed by RAP 5(E), his motion would have been accepted by our clerk as being "timely filed." Saturday's receipt for his transaction shows that he paid the USPS for "Priority Mail" (\$18.40) *and* that he paid additional separate charges for "Restricted Delivery" with a tracking number to our clerk (\$12.75) and for "Return Receipt" with its own distinct tracking number (\$4.10). The tracking number for delivery to this Court was affixed to a "U.S. Postal Service Certified Mail Receipt" that properly addressed to our Court and which was stamped by "Bluegrass Station, Lexington, KY 40517" with the date stamp of August 22, 2024.

I can see no substantive difference between the manner of mailing utilized by Saturday in this instance and Registered Mail. Both forms of mailing provide us with third-party proof (from the "transmitting agency") that USPS received the "document from the sender noted by the transmitting agency on the outside of the container used for transmitting, within the time allowed for filing" as required in RAP 5(E). Also, if Saturday had used any other "recognized mail carriers" other than USPS, the envelope this Court's Clerk received from Saturday would have been accepted because his envelope showed "the date the transmitting agency received" the document from him. *Id.* It is this proof, from

a trusted third party agency, that a filing has been transmitted timely which is the basis and purpose for this Court's demand that sender's use registered or express mail when the USPS is utilized, but in this instance, that proof was provided by the USPS when Saturday chose "Priority Mail" with both "Restricted Delivery" and "Return Receipt."

If we look to how the USPS itself treats registered mail, we find that the only difference between registered mail and what Saturday accomplished, are internal security protocols. Saturday's filing attempt was presented to a USPS employee and he paid additional fees for both restricted delivery and return receipt which provided the same monitoring of his filing "from the point of acceptance to delivery" as registered mail would have. For certified mail, the USPS states that mailers can, "[p]rove you sent it [and] [s]ee when it was delivered or that a delivery attempt was made, and get the signature of the person who accepts the mailing when combined with Return Receipt,"<sup>4</sup> which is precisely what Saturday did.

Applied here, the stringent application of the rule serves no recognizable purpose and thwarts our efforts to distance our justice system from hyper-technical requirements that serve only as impediments to citizens' *access to justice*. Dismissing cases without a review of the record and their merits, does not serve the interest of justice or the Commonwealth. Such "blind" rejection of

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<sup>4</sup> *Insurance & Extra Services; Proof of Mailing & Delivery*, United States Postal Service, <https://www.usps.com/ship/insurance-extra-services.htm> (last visited November 26, 2024)

petitions to this Court should be avoided where the rights of other parties to the action are not prejudiced. Each blind rejection gives rise to a malpractice claim if an attorney filed the procedurally deficient pleading.

Recently in *Mahl v. Mahl*, 671 S.W.3d 140, 150–51 (Ky. 2023), this Court wrote that we had, “adopted new Rules of Appellate Procedure (RAP), effective January 1, 2023. These new rules mark a shift from the potential procedural traps formerly faced by parties in appeals.” Our efforts to assist litigants, especially *pro se* litigants, from falling victim to procedural traps did not end with the adoption of the new rules and we must be continually mindful of the necessity of balancing the interest of substantial justice versus strict adherence to the verbiage we have chosen for our rules.

RAP (5)(E)’s disdain for certified mailings stands in contrast to other civil rules and statutes which allow for certified mail to effectuate service. Kentucky Rules of Civil Procedure (CR) 4.01(1)(a) allows for complaints to be served via “registered mail or certified mail return receipt requested” and under our “long arm statute” the Secretary of State is instructed to utilize “certified mail, return receipt requested,” when serving out-of-state defendants. Kentucky Revised Statute (KRS) 454.210(c). If defendants later challenge the validity of service of process, the plaintiff bears the burden of proving compliance with the governing rules for process. *Griffith v. St. Walberg Monastery*, 427 S.W.2d 802 (Ky.1968). However, there is always a presumption that a communication that was properly stamped, addressed and deposited in the mail was received by addressee. Once the fact of address, stamp and deposit is proven, the burden

shifts to the addressee to prove that he never received the letter. *Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc.*, 690 S.W.2d 393 (Ky.1985). We should follow a similar approach when it comes to the issue of timely filing.

The manner in which Saturday utilized certified mail, paying additional fees to the USPS for restricted delivery and return receipt, and being able to prove tender to the USPS in a timely fashion, should give us sufficient proof of his “timely” filing and preclude an automatic dismissal without any consideration of the merits of his petition.

I agree with our opinion in *City of Devondale*<sup>5</sup> that a notice of appeal requires strict compliance to invoke the jurisdiction of our appellate courts. However, a “substantial compliance” approach should be taken with timely filed procedurally deficient pleadings to ensure that parties, who bring justiciable and important matters to this Court, are actually heard instead of having our doors shut to them due to any unnecessary complexities found deep within our rules.

Rather than an automatic dismissal, in instances such as this I believe our Court should issue a show cause order to movants, with an opportunity for input from the respondents to demonstrate their prejudice. Movants, if *pro se*, and attorneys representing movants, could also face monetary sanctions for their failure to comply with our rules.

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<sup>5</sup> *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990) (“There are policy considerations that mandate strict compliance with the time limit on filing of the notice of appeal. Potential parties to an appeal have the right to know within the time specified in the rule that they are parties.”).



Here, the movant should be found to have timely filed a motion for discretionary review, albeit one that was procedurally deficient. Saturday purports to represent two distinct parties in his motion for discretionary review, one in which he represents himself and a second in which he alleges to represent his father's interests. I would recommend a show cause order be issued to him, with response due within thirty days, as to why he should not be ordered to pay a \$50.00 fine for his failure to strictly follow our filing rules with regard to registered or express mail for his *pro se* filing.

I would also recommend a second order be entered for Saturday to show cause whether he has present legal authorization to represent his father's affairs before this Court or whether his advocacy constitutes the unauthorized practice of law. This approach would allow us to serve the purpose of motions for discretionary review by allowing the filing and considering the underlying merits, or lack thereof, of the presented claims.

While Saturday incorrectly utilized certified mail, which is not permitted by RAP 5(E), he did so in such a manner, and with sufficient proof, that this Court can independently confirm that he timely "filed" his motion with this Court. Under such circumstances, and where there has been no showing of prejudice to the respondents, we should utilize the more forgiving standard of "substantial compliance" when, such as here, Saturday's attempt at filing was more than sufficient to satisfy the underlying rationale for our rule, even if it did not meet the letter of it. Discretionary review by this Court is, as the name indicates, "a matter of judicial discretion." Even if we allow filing so we can

review the merits of a motion, the substantial majority of discretionary reviews sought are not granted.

With the adoption of our original civil rules we began to recognize the concept of “notice pleading” where the principal objective of our rules was to give opposing parties “fair notice of the essential nature of the claim presented and the type of relief to which the claimant deems himself entitled.” *Lee v. Stamper*, 300 S.W.2d 251, 253 (Ky. 1957). This marked our first attempt “to get away from the strict requirements of the Civil Code.” *Id.* at 255.

We reaffirmed these principles in 1982 stating, “[t]he principal objective of pleadings is to give the opposing party fair notice, and where the conduct of the parties leaves no doubt that this objective has been met, this Court has upheld the intent of the ‘notice’ nature of the Civil Rules.” *Roberts v. Conley*, 626 S.W.2d 634, 639 (Ky. 1982).

Our progression from strict compliance to substantial compliance is most notable when reviewing the contents of a notice of appeal. Previously, appeals were governed by CR 73. CR 73.03(1) stated that “[t]he notice of appeal shall specify by name all appellants and appellees” and for decades, courts in this Commonwealth imposed a strict compliance requirement in conjunction with this rule. However, in *Blackburn v. Blackburn*, 810 S.W.2d 55, 56 (Ky. 1991), this Court stated, “[w]hile this Court recognizes the requirement for compliance with CR 73.03 [Notice of Appeal], *the purpose of this Rule must be explored in its application.* The plain reading of the Rule demonstrates the notice concept which is fundamental to modern pleading under the Civil Rules.” (Emphasis

added). In *Blackburn*, while the appellant had named all indispensable parties (the appellees) in the caption of the notice of appeal, he had not listed all in body of the motion. We found that fair notice was given to the opposing parties and thus, the objective of the notice was satisfied stating, “[a] failure to reverse the decision of the Court of Appeals would result in an unfair outcome to the Appellants and would overburden this Court’s standards of compliance with the Rules.” *Id.* at 56.

In 2010, this Court ruled on another defective notice of appeal matter and determined “that the naming of an agency to a lawsuit is equally the functional equivalent of naming the agency’s head in his official capacity.” *Lassiter v. American Exp. Travel Related Services Co., Inc.*, 308 S.W.3d 714, 719 (Ky. 2010). Later in 2015, we held that a CR 59.05 motion to alter, amend or vacate a judgment that fails to state any grounds, in apparent violation of CR 7.02, nevertheless “substantially complied” with the civil rules and tolled the filing of a notice of appeal under CR 73.02(1)(e). *Ky. Farm Bureau Ins. Co. v. Conley*, 456 S.W.3d 814 (Ky. 2015). This decision aligned with my prior dissent in *Stanley v. C & R Asphalt, LLC*, 396 S.W.3d 924 (Ky. App. 2013).

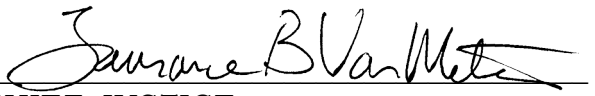
We must continue the progress we have made in simplifying our rules for the public and making allowances for non-prejudicial technical errors to give citizens of the Commonwealth full and fair access to our Court. When there has been a violation of one of our procedural rules—that has not prejudiced other parties—we should punish the lawyer or movant, and then address the content of the pleading on its merits. In these cases, we can issue fines to the lawyers

or persons responsible for the violation without the preemptory termination of the underlying action.

RAP 5(E) concerns timely filing with this Court and we should readily determine that, while Saturday violated the specific directives of the rule, he “substantially complied” with the rule when his attempt at timely filing through the USPS can be independently verified.

Lambert, J., joins.

ENTERED: December 19, 2024.

  
CHIEF JUSTICE