

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2013-SC-000252-D



KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY

APPELLANT

VS.

ON DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS 2011-CA-1764

KEITH JUSTIN CONLEY, ET AL

APPELLEES

BRIEF ON BEHALF OF APPELLEES LORETTA NEWSOME, and
GREGORY NEWSOME, INDIVIDUALLY AND AS ADMINISTRATOR FOR
THE ESTATE OF JESSICA NEWSOME

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Glenn M. Hammond".

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was served by U.S. Mail, first class postage pre-paid, upon the following parties: **Hon. Marcia L. Wireman**, 336 Broadway, P.O. Box 764, Jackson, Kentucky 41339; **Hon. Michael D. Risley** **Hon. Bethany A. Breetz**, Stites & Harbison, PLLC, 400 West Market Street, Suite 1800, Louisville, Kentucky 40202-3352, **Hon. Debbie Lewis**, P.O. Drawer 1179, Hazard, Kentucky 41702; **Hon. Ned Pillersdorf**, 124 West Court Street, Prestonsburg, Kentucky 41653; **Hon. Steven W. Owens**, P.O. Box 1426, Pikeville, Kentucky 41502; **Hon. Kimberley Childers**, Judge, Knott Circuit Court, P.O. Box 867, Hindman, Kentucky 41822; **Sam Givens**, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and the original and ten copies to **Clerk, Supreme Court of Kentucky**, State Capitol, Room 235, 700 Capitol Ave., Frankfort, KY 40601. This the 8th day of July, 2014.

A handwritten signature in blue ink, appearing to read "Glenn M. Hammond".

GLENN MARTIN HAMMOND

STATEMENT CONCERNING ORAL ARGUMENT

The Appellees do not seek oral argument in this case and believe that the Court can adequately render a decision on this matter based on the record and briefs submitted herein.

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COUNTERSTATEMENT OF THE CASE

This is an appeal by the Appellant Kentucky Farm Bureau Mutual Insurance Company, from the dismissal of its appeal from the Knott Circuit Court's decision by the Court of Appeals. The Court of Appeals dismissed the Appellant's appeal based on the determination that the Appellant's CR 59.05 motion did not toll the time to file an appeal due to the particularity requirements of CR 7.02 not being met.

Jessica Newsome was killed by Keith Justin Conley in December 2004. Loretta Newsome and Gregory Newsome, both individually and in his capacity as administrator of the estate of Jessica Newsome, the Appellees, filed a wrongful death action due to her unfortunate and senseless death on December 14, 2005. Kentucky Farm Bureau Mutual Insurance Company, the Appellant, intervened on April 27, 2006. The Appellant moved for a determination on a declaration of rights on May 12, 2011. A decision was rendered on June 23, 2011 in favor of the Appellees.

On June 29, 2011, the Appellant filed a **Kentucky Rule of Civil Procedure (CR) 59.05** motion to alter, amend or vacate within the ten (10) day time period required by the rule. However, the **CR 59.05** motion did not state the grounds to set aside that Order. The Appellant then waited over forty (40) days before submitting the supplemental brief regarding the **CR 59.05** motion. The actual notice of appeal was not filed until three months after the initial order the Appellant wished to appeal was entered. The Appellees filed a motion to dismiss based on these facts, and the motion was granted. The Court of Appeals granted the Appellees' motion to dismiss upon finding that the Appellant failed to file a timely notice of appeal. The Appellant seeks reversal of the Court of Appeals Order Vacating March 12, 2013 Order and Granting Motion to Dismiss.

The Appellant argues that the Court of Appeals erred in granting the motion to dismiss and claims that the **CR 59.05** motion tolled the thirty (30) day period the parties have to file a notice of appeal. The Appellant contends that the **CR 59.05** motion was valid despite the failure to state the grounds to set that Order aside, and even if it was invalid, it would toll the running time. The basis of the Appellant's claim is that the precedent established in **Matthews v. Viking Energy Holdings, LLC, 341 S.W.3d 594 (Ky. App. 2011)**, which was the basis for the Court of Appeals' decision to grant the motion to dismiss, should be overruled. The Appellant claims that the precedent violates the policy to protect an individual's right to an appeal; is inconsistent with the substantial compliance doctrine, with the applicable rules; and with the controlling precedent. Additionally, the Appellant claims that the precedent relies upon an unpublished opinion; and that the precedent should be overruled.

The issue before the Supreme Court is the procedural questions of whether a **CR 59.05** motion is invalid if it contains no grounds at all, and whether a motion that contains no grounds will toll the thirty (30) day period the parties had to file notice of appeal. The Court of Appeals did not enter a decision on any issues of substantive law that were presented to the Knott Circuit Court. The only issues that were before the Court of Appeals were the procedural questions regarding the blank **CR 59.05** motion and the effect on the running time. As such, the only issues before the Supreme Court are those procedural questions.

ARGUMENT

The issue presented by Kentucky Farm Bureau Mutual Insurance Company, the Appellant is the procedural question of whether a **Kentucky Rules of Civil Procedure (CR) 59.05** motion to alter, amend, or vacate which fails to state with grounds for the motion is invalid

due to the particularity requirements of CR 7.02, and whether an invalid motion still tolls the thirty (30) day running time for the notice of appeal.

I. **THE COURT OF APPEALS WAS CORRECT IN ITS HOLDING THAT THE RULE 59 MOTION DID NOT TOLL THE TIME FOR FILING A NOTICE OF APPEAL.**

The Court of Appeals is capable of applying applicable law, including the precedent established in Matthews v. Viking Energy Holdings, LLC, 341 S.W.3d 594 (Ky. App. 2011), to determine if notice of appeal is timely filed. The Kentucky Rules of Civil Procedure govern the timing and requirements for filing a valid notice of appeal. The applicable rule states that the notice of appeal shall be filed within thirty (30) days after a judgment or order is entered. CR 73.02(1)(a). The thirty (30) day time period is terminated by a timely motion pursuant to the Kentucky Rules of Civil Procedure, and that the running time for the appeal is then based on the order either granting or denying the motion. CR 73.02 (1)(e). The result of a party's failure to file a timely notice of appeal is dismissal or denial of the appeal. CR 73.02(2). A CR 59.05 motion is an example of a motion that would toll the thirty (30) day time period. In order to be valid, CR 59.05 requires that a motion to alter, amend or vacate a judgment must be filed no later than ten (10) days after the final judgment is entered. CR 59.05. This rule is subject to the general provision which requires all motions shall state the grounds with particularity. CR 7.02 (1).

Matthews v. Viking Energy Holdings, LLC, 341 S.W.3d 594 (Ky. App. 2011) is the precedent which was used to determine whether the Appellant's notice of appeal was timely filed. In Matthews v. Viking Energy Holdings, LLC, the Court of Appeals found that a CR 59.05 motion that not only failed to state the grounds with particularity, but failed to state any grounds at all is invalid. Matthews v. Viking Energy Holdings, LLC, 341 S.W.3d 594, 599

(Ky. App. 2011). As such, the motion did not toll the thirty (30) day time period in which the parties had to file a notice of appeal. The central issue was not that the CR 59.05 contained a flaw or failed to comply with a minor technical requirement; rather, the motion failed to state any grounds to set aside the Order. The Court decided that a blank motion will not be sufficient to toll the running time for notice of appeal.

The issue of whether the holding in Matthews v. Viking Energy Holdings, LLC, would conflict with the policy of encouraging a party's right to appeal and the substantial compliance doctrine was addressed by the Court in that case. Id. The Courts stated that the purpose of post-trial motions is to allow the courts to review the decision, and when the post-trial motion fails to provide any substance at all, it does not indicate why the decision was in error. Id.

In this case, the Knott Circuit Court entered a judgment on June 23, 2011. The Appellant filed the motion to alter, amend or vacate the judgment pursuant to CR 59.05 on June 29, 2011. Although the motion was filed within the ten (10) days required by the rule, the motion did not state any grounds at all. The CR 59.05 filed by the Appellant contained only the following:

“Comes the Intervening Plaintiff, Kentucky Farm Bureau Mutual Insurance Company, by counsel, and hereby moves this Court to alter, amend or vacate it's [sic] Order and Judgment entered on June 23, 2011. In support of this motion, counsel will tender a brief to be reviewed by the Court.”

The Appellant's motion was invalid under CR 7.02 because it did not provide any reasons or grounds. It is not the case that the Appellant made a flawed statement or a minor procedural error; rather, the Appellant did not state any grounds at all. CR 7.02; Matthews v. Viking Energy Holdings, LLC, 341 S.W.3d 594 (Ky. App. 2011). The brief in which the Appellant

set for the reasons for appeal was not filed until August 8, 2011. The brief was submitted well outside the ten (10) day time frame required by **CR 59.05**. Furthermore, the submission of the brief was not timely. The timeframe set forth by **CR 59.05** is ten days. The brief supporting the **CR 59.05** motion was not filed until forty (40) days later. Even when viewed liberally, the brief stating the reasons for the motion was not timely filed. Therefore, the Appellant's motion did not toll the thirty (30) day running time in which the parties had to file a notice of appeal.

Since the **CR 59.05** motion was defective, the Appellant's notice of appeal should have been filed no later than July 25, 2011 because July 23rd of that year happened to be a Saturday. The Appellant did not file the notice of appeal until September 26, 2011. As such the notice of appeal was well outside the thirty (30) day time frame and was not timely pursuant to **CR73.02(1)(a)**.

Furthermore, the precedent established in **Matthews v. Viking Energy Holdings, LLC**, states that when a **CR 59.05** motion does not state even one ground for support, then it is incomplete and invalid. **Matthews v. Viking Energy Holdings, LLC, 341 S.W.3d 594, 599 (Ky. App. 2011)**. Therefore, the case law which is on point supports the determination the Appellant's **CR 59.05** motion was invalid because the motion did not state any grounds and the supporting brief was filed forty (40) days later.

There were at least two Motion Hours were held in the time span between filing its Motion and filing the brief. When the Appellant did submit a brief, it failed to set out anything new or different from what it initially argued. The Appellant failed to set out any errors that the Judge made; failed to list any technical violations that were made; and failed to show any abuse of discretion. As a safety mechanism, since the Appellant failed to argue anything different in its brief when same was ultimately filed, than what the Appellant initially

argued, it could very easily have filed a Notice of Appeal, which option to do so was available.

II. **MATTHEWS V. VIKING ENERGY HOLDINGS SHOULD NOT BE OVERRULED AND IS NOT INCONSISTENT WITH THE DOCTRINE OF SUBSTANTIAL COMPLIANCE.**

Matthews v. Viking Energy Holdings, LLC, should not be overruled, nor is it inconsistent with the doctrine of substantial compliance. The holding in **Matthews v. Viking Energy Holdings, LLC**, does not ignore the language of the applicable procedural rules. While it is true that there is not an express “invalidity” provision in **CR 59.05**, a blank **CR 59.05** motion is invalid under **CR 7.02** for failing to give specific reasons for the trial court to consider altering, amending, or vacating the judgment. Although **CR 7.02** is not specifically restated in the section regarding post-trial motions, the general provision is applicable to all motions regardless of whether they are pre or post trial. Under this rule, any motion made to the court, unless it is made during a hearing or trial, shall be in writing, state the reasons with particularity, and the relief that is sought. **CR 7.02(1)**. Since a **CR 59.05** post-trial motion is one that is submitted to the court outside of a hearing or trial, it falls under the scope of **CR 7.02**. If **CR 7.02** does not apply to post-trial motions, then it would open the door for attorneys to make an empty motion simply to toll the running time after the trial.

The Court directly addressed this issue by stating that they adopted the majority rule of applying **CR 7.02** to post trial motions in order to address the concern that one party can extend the running time for filing an appeal based on pretext alone if the post trial motions are not required to contain any substance. **Matthews v. Viking Energy Holdings, LLC**, 341 S.W.3d 594, 599 (Ky. App. 2011). Likewise, the Court did not ignore the language in **CR 73.02** when it found that a blank **CR 59.05** does not toll the running time to file for appeal. The Court simply

decided that in order to prolong the length of time to file notice of appeal, parties have to state at least one substantive reason. The Court did not ignore the language of the rules; rather, the Court intentionally chose to apply **CR 7.02** to post-trial motions. This decision was made to prevent empty motions from being used as a pretext for parties to extend the time to file for appeal. It would be unwise to allow a motion that does not state any grounds at all to toll the running time to file an appeal. Automatic dismissal is the penalty for failure of a party to file a timely notice of appeal. **Excel Energy, Inc. v. Commonwealth Institutional Securities**, 37 S.W.3d 713, 716 (Ky. 2000), **CR 73.02(2)**.

The holding in **Matthews v. Viking Energy Holdings, LLC**, does not violate a party's right to appeal and to have the appeal decided on the merits. The precedent does not require that a flawed post-trial motion be found invalid; rather, it merely requires that the motion must contain at least some substance. **Matthews v. Viking Energy Holdings, LLC**, 341 S.W.3d 594, 599 (Ky. App. 2011). All that is required is for parties making a **CR 59.05** motion to provide at least one reason that the trial court should review the decision. Finding that a blank **CR 59.05** motion is insufficient to toll the running time in which to file an appeal does not violate the parties right to file an appeal or have it heard on the merits.

CONCLUSION

The reversal of the Court of Appeals' Order granting the motion to dismiss should be denied. The Court of Appeals correctly applied **CR 7.02's** requirement that a motion must state the grounds on which the motion is made. Since the Appellant's **CR 59.05** motion did not provide any reason at all, it was invalid and did not toll the running time in which the Appellant had to file a timely notice of appeal.

The Court was correct to rely on the precedent in Matthews v. Viking Energy Holdings, LLC, and the holding in that case should not be overruled. The danger posed by accepting the Appellant's interpretation of the procedural rules and overruling Matthews v. Viking Energy Holdings, LLC, is that it allows for parties to abuse the rules to extend the running time in which parties can file a notice of appeal. In the present case, the Appellant filed a blank **CR 59.05** motion that did not provide any reasons to the trial court or the Appellees as to why the decision should be reversed. The Appellant then waited forty (40) days to submit a brief to supplement the blank motion. It is unjust to allow parties to abuse the procedural rules in this manner. Therefore, when a **CR 59.05** motion that does not even state one reason for the decision to be reviewed should not be allowed to toll the running time for notice of appeal.

Finally, the Court of Appeals is capable of reading a **CR 59.05** motion to determine whether it is merely flawed or invalid and applying the applicable rules. Not allowing parties to make a blank **CR 59.05** motion to toll the running time as long as they supplement at some point after they make the motion, even if it is several months later, does not deprive a party of their right to appeal a decision or have the decision heard on its merits. Rather, the rule supports those vital interests by requiring **CR 59.05** be based on at least one reason. This ensures that the appeals brought before the courts have merit and are based on at least one reason. Additionally, the current interpretation of the rules prevents the procedural rules from being abused to extend running times. For these reasons, the reversal of the Court of Appeals' decision should be denied.

WHEREUPON, the Respondents, **LORETTA NEWSOME, AND GREGORY NEWSOME, INDIVIDUALLY AND AS ADMINISTRATOR FOR THE ESTATE OF JESSICA NEWSOME**, respectfully demand an Order of the Court **DENYING** Appellant's

request for reversal of the Court of Appeals' decision and any and all other relief to which they may be entitled to at law and/or in equity.

Respectfully submitted,



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