

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

KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY

APPELLANT

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

KEITH JUSTIN CONLEY, ET AL.

APPELLEES

**REPLY BRIEF OF KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY**

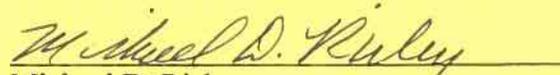
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CERTIFICATE OF SERVICE

This is to certify that this Reply Brief has been served by mailing a true copy thereof, postage prepaid, on this 17th day of July, 2014 to: Hon. Kimberley Childers, Judge, Knott Circuit Court, P.O. Box 867, Hindman, KY 41822; Hon. Glenn M. Hammond, P.O. Box 1109, Pikeville, KY 41502; Hon. Debbie Lewis, P.O. Drawer 1179, Hazard, KY 41702; Hon. Ned Pillersdorf, 124 West Court Street, Prestonsburg, KY 41653; and Hon. Steven W. Owens, P.O. Box 1426, Pikeville, KY 41502. It is further certified that the Record on Appeal has been returned to the Knott Circuit Clerk's Office.


Michael D. Risley

Appellees Loretta Newsome and Gregory Newsome cite *Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc.*, 37 S.W.3d 713, 716 (Ky. 2000), for the proposition that “automatic dismissal is the penalty for failing to file a timely notice of appeal.” This case actually presents a different question from the one decided in *Excel Energy*; the issue here is whether a timely filed yet allegedly defective Rule 59.05 motion to alter or amend tolls the time in which to file a notice of appeal per Rule 73.02(1)(e). While *Excel Energy* confirms that the issue presented in this case is not jurisdictional, it does little to help resolve that issue.

Instead, this Court’s decisions in *Foxworthy v. Norstam Veneers, Inc.*, 816 S.W.2d 907 (Ky. 1991), and *Norwest Bank Minnesota, N.A. v. Hurley*, 103 S.W.3d 21 (Ky. 2003), are instructive. *Foxworthy* and *Norwest Bank* dealt with timely filed yet defective notices of appeal. In both cases, the problem with the notice of appeal (lack of contemporaneous payment of the filing fee required by Rule 73.02(1)(b)) was not corrected until after the time for filing the notice of appeal had expired. Nonetheless, in each case this Court reversed the Court of Appeals’ dismissal of the appeal. *See* 816 S.W.2d at 910; 103 S.W.3d at 24.

In *Foxworthy*, this Court reasoned that there was no need to impose a Draconian sanction for not paying the filing fee at the time the notice of appeal was filed (even though Rule 73.02(1)(b) required it), and recognized:

Most certainly automatic dismissal, cutting off the right of appeal guaranteed by Section 115 of our Kentucky Constitution, qualifies as a Draconian measure.

816 S.W.2d at 909.

This Court later reached the same result in *Norwest Bank*, in which this Court distinguished *Excel Energy* based on the “straightforward application of CR 73.02(2),”

which provides that the failure to timely file a notice of appeal shall result in dismissal. 103 S.W.3d at 23. Because the defective notice of appeal in *Norwest Bank* was nonetheless timely filed, “dismissal was not mandated by the rule.” *Id.*

The automatic dismissal rule adopted by the Court of Appeals in *Matthews v. Viking Energy Holdings, LLC*, 341 S.W.3d 594 (Ky. App. 2011), and applied by the Court of Appeals in this case, is the type of Draconian measure rejected by this Court in *Foxworthy* and *Norwest Bank*. Just as the straightforward application of Rule 73.02(2) calls for a timely filed but defective notice of appeal to be effective in making the appeal timely, the straightforward application of Rule 73.02(1)(e) calls for a timely filed but allegedly defective Rule 59.05 motion to be effective in tolling the running of the appeal time. If, as established in *Foxworthy* and *Norwest Bank*, a timely filed but defective notice of appeal satisfies Rule 73.02(2), certainly a timely filed but allegedly defective Rule 59 motion satisfies Rule 73.02(1)(e).

Foxworthy and *Norwest Bank* are examples of the application of the doctrine of substantial compliance, which precludes the automatic dismissal of an appeal in the circumstances presented here. The doctrine of substantial compliance is premised on deciding cases on their merits, not on technicalities. *Lassiter v. American Exp. Travel Related Services Co.*, 308 S.W.3d 714, 718 (Ky. 2010). One of the primary objectives of appellate practice is to see “that litigants do not needlessly suffer the loss of their constitutional right to appeal.” *Ready v. Jamison*, 705 S.W.2d 479, 482 (Ky. 1986).

While appellees suggest that *Matthews* is “not inconsistent” with the doctrine of substantial compliance, Appellee Brief, at 6, the Draconian automatic dismissal rule adopted by the Court of Appeals in *Matthews* is the antithesis of the doctrine of

substantial compliance: a party with a meritorious appeal has needlessly lost its right to appeal based not on the merits but on a technicality. In fact, even before this Court adopted the doctrine of substantial compliance, this Court's predecessor court in *Newdigate v. Walker*, 384 S.W.2d 312 (Ky. 1964), held that a motion that violated Rule 7.02 nonetheless tolled the time in which the movant could file an answer. Thus, in dismissing Kentucky Farm Bureau's appeal, the Court of Appeals strayed from multiple controlling authorities from this Court and its predecessor court.

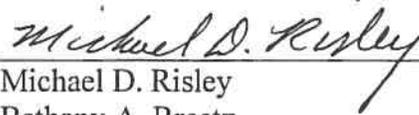
Finally, missing from appellees' brief is any suggestion that they were in any way prejudiced by how the trial court dealt with Kentucky Farm Bureau's Rule 59 motion. Kentucky Farm Bureau filed the memorandum in support of its motion prior to the hearing on the motion, and appellees filed their response to the motion prior to the hearing. The trial court ruled on the Rule 59 motion within 20 days of hearing arguments on the motion. Neither in the motion to dismiss the appeal filed in the Court of Appeals nor in their brief filed in this Court do appellees argue that they were prejudiced in any way by Kentucky Farm Bureau's alleged violation of Rule 7.02 or how the trial court handled the Rule 59 motion. The Court of Appeals did not cite any harm to the appellees when it dismissed Kentucky Farm Bureau's appeal.

Notwithstanding the absence of any harm or prejudice to the appellees, the Court of Appeals dismissed Kentucky Farm Bureau's appeal. For the multiple reasons discussed in Kentucky Farm Bureau's initial brief and herein, the Court of Appeals erred in doing so.

Kentucky Farm Bureau respectfully requests this Court to reverse the dismissal of its appeal. While Kentucky Farm Bureau believes the law is sufficiently clear to allow

this Court to direct the Court of Appeals to reverse the trial court's finding of insurance coverage for an act of murder, at a minimum this Court should direct the Court of Appeals to allow the appeal to proceed for a resolution on the merits.

Respectfully submitted,



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