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Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000676-MR

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 06-CI-01289

COPPER CARE, INC.

APPELLEE

OPINION REVERSING

** ** *

BEFORE: CAPERTON, LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: The Cabinet for Health and Family Services (the Cabinet) appeals from an order of the Madison Circuit Court denying its motion for summary judgment against Copper Care, Inc. (Copper Care). The issue raised is whether the circuit court properly held that Copper Care's exceptions to the hearing officer's findings of fact, conclusions of law, and recommended order were timely filed. For the reasons stated below, we reverse.

The relevant facts are undisputed. On April 14, 2005, the Cabinet issued a "Notice of Revocation and Preliminary Order to Close" seeking to revoke Copper

Care's license based on its alleged failure to meet the standards in the administrative regulations promulgated pursuant to KRS 199.640 for a child-placement agency.

Copper Care requested, and received, an administrative hearing.

On June 29, 2006, the hearing officer issued and mailed to Copper Care, his "Findings of Fact, Conclusions of Law and Recommended Order." By certified mail, return receipt requested, on July 14, 2006, Copper Care mailed exceptions to the hearing officer's order. On July 17, 2006, eighteen days after the order was mailed, the exceptions were filed. Based on its reasoning that Copper Care's exceptions were not filed within fifteen days of the mailing of the recommended order as required by KRS 13B.110(4), the Cabinet accepted the hearing officer's recommended order.

Copper Care filed a complaint in the Madison Circuit Court seeking review of the Cabinet's order. In addition to its answer, the Cabinet filed a motion for summary judgment arguing that, as a matter of law, the exceptions were untimely filed. Copper Care responded claiming that KRS 13B.110(4) requires only that the exceptions be mailed on or before the fifteenth day and that it substantially complied with its provisions. It also asserted, pursuant to Civil Rule (CR) 6.05, it had an additional three days from the fifteenth day in which to file its exceptions. Finally, according to Copper Care's calculation of the time, excluding Saturday and Sunday, the exceptions were filed on the fifteenth day. KRS 446.030. The circuit court agreed with Copper Care that it substantially complied with the statute and denied the Cabinet's motion.

Although not raised by either party, we preface our discussion by addressing the final and appealable rule. Generally, under CR 56.03, a denial of a motion for summary judgment is not appealable because it is interlocutory. The denial of a motion for summary judgment "can in no sense prejudice the substantive rights of the party making the motion since he still has the right to establish the merits of his

motion upon the trial of the cause.” *Midwest Mut. Ins. Co. v. Wireman*, 54 S.W.3d 177, 179 (Ky.App. 2001) quoting *Ford Motor Credit Co. v. Hall*, 879 S.W.2d 487, 489 (Ky.App. 1994). However, an exception to the rule is if the facts are not in dispute and the only basis of the ruling is a matter of law. See *Gumm v. Combs*, 302 S.W.2d 616, 617 (Ky. 1957). This case squarely fits into that exception.

The Cabinet correctly points out that KRS 13B.110(4) specifies that the exceptions must be filed within fifteen days of the mailing of the recommended order.

Specifically, that statute states:

A copy of the hearing officer's recommended order shall also be sent to each party in the hearing and each party shall have fifteen (15) days from the date the recommended order is mailed within which to file exceptions to the recommendations with the agency head. Transmittal of a recommended order may be sent by regular mail to the last known address of the party.

Copper Care does not dispute that it failed to file its exceptions within the fifteen day period; it maintains, however, that its exceptions were timely under the substantial compliance doctrine and pursuant to CR 6.05 and KRS 466.030. Under the prevailing law, we cannot agree with Copper Care.

In *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986), the Court adopted the substantial compliance doctrine as applicable to minor defects in a timely filed notice of appeal. To reconcile judicial decisions with the recently amended CR 73.02(2), the Court held that dismissal of an appeal is not an appropriate remedy “so long as the judgment appealed from can be ascertained within reasonable certainty from a complete review of the record on appeal and no substantial harm or prejudice has resulted to the opponent.” *Id.* at 482.

The issue in this case does not concern CR 73.02. The time for filing exceptions in an administrative proceeding is governed by statute and is a step in the administrative review process.

When interpreting a statute, this Court is required to use the plain meaning of the words used. Statutes must be given a literal interpretation unless they are ambiguous and if unambiguous, no statutory construction is required. *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). “We are not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used.” *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000).

In the context of the administrative review process, KRS 13B.110(4) governs. Prior to the time that a judicial appeal has been perfected, the civil rules have no application. *See Pollitt v. Ky. Unemployment Commission*, 635 S.W.2d 485 (Ky.App. 1982). Strict compliance with the terms of the statute governing the administrative process is required. *Metro Medical Imaging, LLC v. Commonwealth, Cabinet for Health Services*, 173 S.W.3d 916 (Ky.App. 2005).

The language contained in KRS 13B.110(4) is unequivocal and requires that exceptions be *filed* within fifteen days from the date the recommended order is mailed. Absent legislative authority to the contrary, the substantial compliance doctrine is not applicable.

Copper Care next contends that the “mail rule” found in CR 6.05 provided it with an additional three days to file its exceptions. CR 6.05 provides:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period. This provision shall not apply to the service of summons by mail under Rule 4.01(1)(a).

Unfortunately for Copper Care, the application of the additional three days conferred by CR 6.05 has been limited.

The rule is not applicable when the time for filing is triggered by the date of the rendition of the order or entry of judgment. See *Lockard v. Workmen's Compensation Board*, 554 S.W.2d 396, 397 (Ky.App. 1977); *Arnett v. Kennard*, 580 S.W.2d 495 (Ky. 1979). Moreover, in *Chambers v. City of Newport*, 101 S.W.3d 904 (Ky.App. 2002), this Court held that CR 6.05 did not apply to the time requirement in KRS 91A.270 in which an action must be filed in circuit court contesting a property assessment. The court held that CR 6.05 applies only if the pertinent statute provides for the calculation of time “after the service of a notice” rather than after the mailing of the notice. *Id.* at 906.

CR 6.05 is applicable only to those instances when the running of time is calculated from the date of service of notice or other legal document. *Fox v. House*, 912 S.W.2d 450 (Ky.App. 1995). The time period for filing exceptions to an administrative ruling pursuant to KRS 13B.110(4) commences from the date of mailing and not the date of service.

Copper Care's contention that its filing was timely by virtue of KRS 446.030 also must fail. If the fifteenth day from which the recommended order was mailed had been a Saturday, Sunday, or legal holiday, we would agree with Copper Care's assertion. The fifteenth day from the date of its mailing, however, was a Friday. Thus, its argument cannot prevail.

The trial court erroneously concluded that the substantial compliance doctrine saved Copper Care from the consequences of the untimely filing of its exceptions. Although not a jurisdictional defect, the filing of exceptions is, in this case, fatal. The filing of exceptions in an administrative proceeding “provides the means for

preserving and identifying issues for review by the agency head.” *Rapier v. Philpot*, 130 S.W.3d 560, 563 (Ky. 2004). The filing of exceptions is necessary to preserve issues for further review. *Id.*

Since Copper Care’s exceptions were untimely filed, there was no issue properly preserved for review. As a consequence, the circuit court erred when it denied the Cabinet’s motion for summary judgment. The summary judgment entered in favor of Copper Care is reversed and the case remanded for the entry of an order granting the Cabinet summary judgment.

ALL CONCUR.

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