

CASE No. 86622

**IN THE SUPREME COURT OF MISSOURI
JEFFERSON CITY, MISSOURI**

JAMES R. BERGER

Vs. Appellant,

**Supreme Court No. SC 86622
WD 64896
Circuit Court No. 03-CV-183-031**

**CAMERON MUTUAL
INSURANCE COMPANY**

Respondent

Appeal from the Circuit Court of Saline County, Missouri

Appeal from the Missouri Court of Appeals, Western District

**APPELLANT'S REPLY SUBSTITUTE BRIEF IN RESPONSE TO
RESPONDENT'S SUBSTITUTE BRIEF**

DON B. ROBERSON MO. Bar 16056
Attorney at Law
8154 N. W. Kirkwood Avenue
Kansas City, Missouri 64151
(816) 741-6925
FAX (816) 741-2889
E-mail: DBR@kc.rr.com

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

	Page
Table of Contents	3
Table of Authorities	4
Statement of Facts	5
Statement of Case	5
Argument and Authorities.	6

(1) Contrary Paragraph I of Respondent's Argument and Authorities, the appellant's Motion for a Special Order Granting Leave to file a Notice of Appeal out of time was timely filed within 6 months of the final judgment as required by Rule 81.07.

(II) Contrary to Paragraph II of Respondent's Argument and Authorities that the Court of Appeals was not in error in denying the appellant Motion for a Special Order granting Leave to file a Notice of Appeal out of Time, as the Appellant's Motion and accompanying Affidavit of Appellant's attorney demonstrated without contradiction that failure to file Notice of Appeal was not due to culpable negligence under the provisions of Rule 81.07.

(III) Respondent's contention that Kingler v. Director of Revenue, 281 F.3d 776 (8th Cir. 2002) has no bearing on the

issues before the court is misleading and misplaced, as Missouri law under Rule 81.07 is not in conflict, and is controlling, since a filing of notice of appeal out of time is permitted if culpable negligence is not shown, and culpable negligence is not demonstrated in appellant’s attorney’s affidavit that accompanied the Request for Transfer to the Missouri Supreme Court.

(IV) Conclusion.....

Certificate of Service

Rule 84.06 (c) and Rule 84.06 (g) Certification

Appendix

TABLE OF AUTHORITIES

	Page
State ex rel. Eddy v. Rolf 145 S.W.3d (Mo. App. 2004)	
Citing Taylor v. United Parcel Serv. Inc.	
854 S.W.2d 390 (Mo. Banc 1993)	5, 6
Brown v. Hamid	
856 S.W.2d 51, 53 (Mo. Banc 1993)	
citing Sherrill v. Wilson, 653 S.W.2d 661,663	
(Mo. Banc1983)	8
Federal Cases	

Kingler vs. Director of Revenue

281 F.3d 776 (8th Cir. 2002) 8

Statutes and Rules

Missouri Court Rule 81.07 6

Missouri Court Rule 78.04 7

Missouri Court Rule 81.079

Missouri Court Rule 84.06 (c) and (g)11

January 4, 2005 Notice of Appeal 11

February 3, 2005 Notice of Court of Appeals Order.....11

STATEMENTS OF FACTS

The parties agree that Appellant appeals from the denial by the Missouri Court of Appeals, Western District's of Appellant's Motion for a Special Order Granting Leave for Plaintiff to File a Notice of Appeal Out of Time. No reason was given for the denial.

STATEMENT OF THE CASE

The issue in this case is whether the Appellant's delay in filing notice of appeal timely was due to culpable negligence that precludes an order being given to permit the filing of the notice of appeal out of time.

The Respondent would lead the court to accept the contention of the Respondent that Appellant would not have a viable cause for relief if the Notice of Appeal were to be extended by Order of the Court. Appellant does not believe that

contention is appropriate on the issue before the court, but since it has been mentioned, a response in limited form is warranted in the opinion of appellant's counsel.

In that regard an appeal would not be frivolous and appellant's counsel would not pursue an appeal if there was no merit warranting the appeal on the basis of his experience of over 45 cases resolved on appeal in Missouri, without counting out of state jurisdiction counsel has had on appeal, and the two cases in which Appellant's counsel has prevailed on the two instances before the U. S. Supreme Court.

The reliance of Respondent on the Eddy decision (145 S.W.3d 429) (Mo. App. 2004) is misplaced as that decision noted the after trial motion in that cause was not directed to any error of fact or law, in contrast to the instant cause in which errors of fact and/or law cited some 4 grounds of trial error, in addition to 17 grounds under ground paragraph 5 alone.

ARGUMENT AND AUTHORITIES

Contrary to Respondent's Argument I and Authorities, the appellant's Motion for a Special Order Granting Leave to file a Notice of Appeal out of time was timely filed within 6 months of the final judgment as required by Rule 81.07.

The 6 month period from the final judgment commenced on March 10, 2004, and the 10-day appeal time extended the filing time for appeal to March 20, 2004, and the filing for a special Order to file out of time was timely filed within 6 months

on December 20, 2004. No 3 day extension for mailing the March 10, 2004 judgment order is added in the above calculated intervals of time.

The respondent cites the Eddy case (*State ex rel. Eddy v. Rolf* 145 S.W.3d 42, 433) (Mo. App. 2004) that cites *Taylor v. United Parcel Serv., Inc.* 854 S.W.2d 390, 392 n. 1 (Mo. Banc 1993) to question the Appellant's Motion for a rehearing to be a valid after trial motion. However, those citations do not preclude Appellant having a valid motion upon which to file an after trial motion. The plaintiff's motion in the Eddy decision was not directed to any ground premised on error of law or fact, in contrast to the instant cause where Appellant's after trial motion had 4 grounds of alleged error on the law and fact, with an additional 12 grounds of error on law and fact under paragraph 5.

Certainly, the Eddy decision and the Taylor decision referred to in the Eddy decision, while cited by the Respondent, are actually decisions favoring Appellant, as Appellants after trial motion was directed to the errors of the trial court on both questions of law and fact, which requirements were in the Appellant's after trial motion and not present in the Eddy case.

The Appellant's Motion for Rehearing on Court's Judgment Order of February 24, 2004 from the bench was not finalized until the mailing of the Judgment Order dated March 10, 2004. The Appellant's Motion for Rehearing was filed prematurely, as it was filed

Under the provisions of Missouri Court Rule 78.04 the Appellant's Motion to set aside the final Judgment Order dated March 10, 2004 and mailed to Appellant on

that date was certainly within the definition of what is construed under Rule 78.04 (Motion for New Trial – time for filing) to be an after trial motion, reading in pertinent part, as follows:

“Any motion for new trial and any motion to amend the judgment or opinion shall be filed not later than 30 days after entry of judgment...”

II

Contrary to Paragraph II of Respondent’s Argument and Authorities that the Court of Appeals was not in error in denying the appellant Motion for a Special Order granting Leave to file a Notice of Appeal out of Time, as the Appellant’s Motion and accompanying Affidavit of Appellant’s attorney demonstrated without contradiction that failure to file Notice of Appeal was not due to culpable negligence under the provisions of Rule 81.07.

It has long been a maxim of American justice that cases should be heard if possible on the merits, Brown vs Hamid 856 S.W.2d 51, citing Sherrill v. Wilson, 653 S.W.2d 661, 663 (Mo. Banc 1983). The affidavit of Appellant’s counsel manifests a chronology of events and the exigencies of a trial attorney that demonstrates a failure to timely file a notice of appeal was not the result of culpable negligence but an excusable inadvertent oversight under the circumstances reviewed in Appellant attorney’s affidavit.

III

Respondent’s contention that Kingler v. Director of Revenue, 281 F.3d 776 (8th Cir. 2002) has no bearing on the issues before the court is misleading and misplaced, as Missouri law under Rule 81.07 is not in conflict, and is controlling and is Missouri law under Missouri Court Rule 81.07, since a filing of notice of appeal out of time is permitted if culpable negligence is not shown, and culpable negligence is not demonstrated in appellant’s attorney’s affidavit that accompanied the Request for Transfer to the Missouri Supreme Court.

The Respondent’s argument that Kingler v. Director of Revenue, as cited by the Appellant has “...no bearing on the issues before the court...” is misplaced and fallacious. The Kingler decision recites Missouri law correctly, and Missouri law rests upon the Missouri Court Rule 81.07.

CONCLUSION

The Court of Appeals did abuse its discretion in denying without explanation Appellant’s Motion for a Special Order Granting Leave for Plaintiff to File a Notice of Appeal within 6 months as authorized by Missouri Court Rule 81.07, in defiance of Appellant attorney’s affidavit accompanying the Application to file within 6 months under the provisions of Missouri Court Rule 81.07.

Under applicable court rules and case law appellant requests an Order of this court, reversing the Missouri Court of Appeals, and issuing an Order permitting the Appellant to file a notice of Appeal out of time from the trial court's Judgment Order dated March 10, 2004 in conformity to Missouri Court Rule 81.07.

Respectfully submitted,

DON B. ROBERSON Mo. Bar 16056
Attorney at Law
8154 N. W. Kirkwood Avenue
Kansas City, Missouri 64151
(816) 741-6925
FAX (816) 741-2889
E-mail: DBR@kc.rr.com

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

Plaintiff-Appellant certifies that two copies of Appellant's Reply Substitute brief with notice of filing with the Missouri Supreme Court was hand delivered this 27th day of June 2005 to the offices of **Kent M. Bevan, Esq.**, of DYSART, TAYLOR, LAY, COTTER & MCMONIGLE, P. C. 4420 Madison Avenue, in Kansas City, Missouri 64111, attorneys for Respondent, Cameron Mutual Insurance Company.

DON B. ROBERSON Mo. Bar 16056
Attorney at Law
8154 N. W. Kirkwood Avenue
Kansas City, Missouri 64151
(816) 741-6925
FAX (816) 741-2889
E-mail: DBR@kc.rr.com

ATTORNEY FOR PLAINTIFF-APPELLANT

RULE 84.06 (c) and RULE 84.06 (g) CERTIFICATION

I certify that this Reply Substitute Brief complies with the limitations contained in Rule 84.06 (b) and contains 1,569 words. I rely on the Word Count in the word processing software, which was Microsoft Word 2003, used to create this Reply Substitute Brief.

In addition, I certify that the disk has been scanned and is virus-free.

Dated this 27th day of June 2005.

DON B. ROBERSON Mo. Bar 16056
Attorney at Law
8154 N. W. Kirkwood Avenue
Kansas City, Missouri 64151
(816) 741-6925
FAX (816) 741-2889
E-mail: DBR@kc.rr.com

ATTORNEY FOR PLAINTIFF-APPELLANT

APPENDIX

1. 81.07.....A-1
2. 81.05.....A-1
3. January 4, 2005 Notice of Appeals OrderA-2
4. February 3, 2005 Notice of Court of Appeals Order A-3