

Case No. SC86622

IN THE SUPREME COURT OF MISSOURI

JAMES R. BERGER,
APPELLANT,

v.

CAMERON MUTUAL INSURANCE, COMPANY,
RESPONDENT,

Appeal from the Circuit Court of Saline County, Missouri
Appeal from the Missouri Court of Appeals, Western District

**SUBSTITUTE BRIEF OF RESPONDENT
CAMERON MUTUAL INSURANCE COMPANY**

Kent M. Bevan MO #23626
Matthew W. Geary MO #53328
DYSART TAYLOR LAY
COTTER & McMONIGLE, P.C.
4420 Madison Avenue
Kansas City, MO 64111
(816) 931-2700/ (FAX) 931-7377
Attorneys for Respondent
Cameron Mutual Insurance Company

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STATEMENT OF FACTS

Appellant, James R. Berger (“Appellant” or “Plaintiff”) appeals from the Missouri Court of Appeals, Western District’s denial of his Motion for a Special Order Granting Leave for Plaintiff to File a Notice of Appeal Out of Time based on an allegation of no culpable negligence. Respondent Cameron Mutual Insurance Company’s (“Cameron”) statement of facts is set forth below.

1. Appellant filed this case in the Circuit Court of Saline County alleging that Cameron breached a contract of insurance with Plaintiff by refusing to pay a claim. *See* Defendant’s Response to Plaintiff’s Motion for a Special Order Granting Leave for Plaintiff to File Notice of Appeal out of Time (“Defendant’s Response to Motion to File Notice of Appeal”) ¶ 1.

2. Appellant failed to comply with the Missouri Rules of Civil Procedure regarding discovery and the Circuit Court’s discovery order, and on March 10, 2004, the Circuit Court entered Judgment in favor of Respondent Cameron for such failures. *See* Judgment, Exhibit 1 to Plaintiff’s Motion for a Special Order Granting Leave for Plaintiff to File Notice of Appeal out of Time (“Judgment”).

3. On March 25, 2004, Appellant filed a Motion for Rehearing in the Circuit Court. *See* Motion for Rehearing, Exhibit 2 to Plaintiff’s Motion for Special Order Granting Leave for Plaintiff to File Notice of Appeal out of Time (“Circuit Court Motion for Rehearing”).

4. The Circuit Court never ruled on Plaintiff's Motion, and on June 28, 2004 Plaintiff cancelled the hearing that he scheduled regarding such Motion. *See* Exhibit 3, to Plaintiff's Motion for a Special Order Granting Leave for Plaintiff to File Notice of Appeal out of Time ("Cancellation of Hearing").

5. Plaintiff never filed a Notice of Appeal in the Circuit Court. *See* Plaintiff's Motion for a Special Order Granting Leave for Plaintiff to File Notice of Appeal out of Time ("Motion to File Appeal out of Time").

6. On December 20, 2004, Appellant filed his Motion for a Special Order Granting Leave for Plaintiff to File a Notice of Appeal out of Time, in the Missouri Court of Appeals, Western District. *See* Motion for a Special Order Granting Leave for Plaintiff to File a Notice of Appeal out of Time.

7. The Missouri Court of Appeals, Western District denied Appellant's Motion for a Special Order Granting Leave for Plaintiff to File a Notice of Appeal out of Time, on January 4, 2005. *See* Order of Missouri Court of Appeals, January 4, 2005 ("January 4, 2005 Order").

Statement of the Case

This is a first party insurance case, in which the Plaintiff/Appellant James Berger ("Appellant") brought an action for alleged breach of contract and misrepresentation against Cameron. Appellant's claims are based upon a homeowners' policy issued to his now ex-wife, Patricia Berger, and Appellant by Cameron. In June of 2001, while

incarcerated in the Tipton Correctional Institute, Appellant filed a claim with Cameron claiming that his wife was stealing personal property from the insured residence. Cameron denied this claim, on July 9, 2001, because theft by a co-insured is not a covered loss under the policy. In October of 2002, Appellant filed another claim with Cameron claiming that his wife had stolen personal property and that the insured residence was vandalized. Cameron was investigating that claim when Appellant filed the suit against Cameron in the Circuit Court of Saline County.

During the course of that litigation, Cameron served Interrogatories and Requests for Production of Documents on Appellant. *See* Judgment. Appellant did not adequately or fully respond to Cameron's discovery requests, and Cameron sought an Order to Enforce Discovery, which was granted by the Circuit Court on December 23, 2003. *See* Judgment p. 2. Appellant did not comply with that Order, and Cameron sought sanctions against Appellant. *See* Judgment p. 2. On February 24, 2004, the Circuit Court held a hearing on Cameron's Motion for Sanctions. *See* Judgment p. 1. The Circuit Court granted Cameron's Motion, and on March 10, 2004, the Circuit Court entered a Judgment dismissing Plaintiff's First Amended Petition with Prejudice. *See* Judgment.

On March 25, 2004, Appellant filed a Motion for Rehearing in the Circuit Court. *See* Circuit Court Motion for Rehearing. The Circuit Court never ruled on Appellant's Motion. On June 28, 2004, Appellant cancelled the hearing that he scheduled regarding

such Motion. *See* Cancellation of Hearing. Appellant never filed a Notice of Appeal in the Circuit Court.

On December 20, 2004, over nine months after the Circuit Court entered its Judgment, Appellant filed his Motion to File Appeal out of Time, in the Missouri Court of Appeals, Western District. *See* Motion to File Appeal out of Time. The Court of Appeals denied Appellant's Motion for a Special Order Granting Leave for Appellant to File a Notice of Appeal Out of Time, on January 4, 2005. *See* January 4, 2005 Order. Appellant then filed a Motion for Rehearing or Alternatively to transfer to this Court. Such Motion was denied by the Court of Appeals on February 3, 2005. Finally, Appellant sought review by this Court, which was granted on April 5, 2005.

Standard of Review

By order, the Court of Appeals, denied Appellant's Motion for a Special Order Granting Leave for Plaintiff to File a Notice of Appeal Out of Time. "This Court will not disturb a special order of the court of appeals absent an abuse of discretion." *Brown v. Hamid*, 856 S.W.2d 51, 53 (Mo. banc 1993) (addressing whether the Court of Appeals abused its discretion in granting a motion for leave to appeal out of time). Therefore, this Court should not reverse the decision of the Court of Appeals to deny Appellant's Motion for a Special Order Granting Leave for Plaintiff to File a Notice of Appeal Out of Time, unless the Court of Appeals abused its discretion.

ARGUMENT AND AUTHORITIES

- I. The Court of Appeals was correct in denying Appellant James R. Berger’s Motion for a Special Order Granting Leave for Plaintiff to File a Notice of Appeal out of Time because Appellant did not file his motion within six months after the judgment became final as required by Rule 81.07.**

Rule 81.07 states in pertinent part: “The special order may be allowed by the appellate court only upon motion with notice to the adverse parties filed within six months from the date of final judgment, and only upon a showing by affidavit, or otherwise, that the delay was not due to appellant’s culpable negligence.” Plaintiff alleges that his failure to timely file a notice of appeal was not due to culpable negligence.

“The six month time period within which appellant could seek such an order has expired and this time period may not be enlarged.” *Snelling v. Masonic Home of Missouri*, 904 S.W.2d 251, 253 (Mo. App. 1995). This six month time period is jurisdictional. *Davidson v. Commerce Bank of New Mexico, N.A.*, 667 S.W.2d 477, 478 (Mo. App. 1984). Therefore, the first question is whether Appellant’s motion to file his notice of appeal out of time was filed within six months of the date of final judgment.

“A judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed.” Rule 81.05(a)(1). If an authorized after-

trial motion is filed the judgment becomes final on the date that the Court rules on the last authorized after-trial motion or, if there is no ruling, ninety days from the date such motion was filed. Rule 81.05(a)(2).

In this case, the Circuit Court entered its Judgment on March 10, 2004. On March 25, 2004, exactly fifteen days after the Judgment, Appellant filed his “Motion for Rehearing on Court’s Judgment Order of February 24, 2004 entered and Forwarded to Plaintiff’s Counsel on March 10, 2004 and for Order Setting Aside Judgment Order Dismissing this Cause.” Therefore, if Appellant’s Motion for Rehearing was an authorized after-trial motion the Judgment became final on June 23, 2004. If, however, Plaintiff’s Motion for Rehearing was not an authorized after-trial motion, the Judgment became final on April 9, 2004. Appellant did not file his Motion to File Appeal out of Time until December 20, 2004. Consequentially, if the Judgment became final on April 9, 2004, Appellant’s Motion to File Appeal out of Time was not timely because it was not filed within six months from the date the Judgment became final. Rule 81.07.

Appellant’s Motion for Rehearing was not an authorized after-trial motion. “An authorized after-trial motion is a motion for which the rules expressly provide.” *State ex rel. Eddy v. Rolf* 145 S.W.3d 429, 433 (Mo. App. 2004) (citing *Taylor v. United Parcel Serv., Inc.*, 854 S.W.2d 390, 392 n. 1 (Mo. banc 1993)). In *Taylor*, this Court recognized six after-trial motions expressly authorized by the rules: (1) “a motion to dismiss without prejudice after the introduction of evidence is commenced under Rule 67.01;” (2) “a

motion for a directed verdict under Rule 72.01(a);” (3) “a motion for judgment notwithstanding the verdict under Rule 72.01(b);” (4) “a motion to amend the judgment, Rule 73.01;” (5) “a motion for relief from judgment or order under Rule 74.06(a) and (b), but see Rule 74.06(c);” and (6) a motion for a new trial under Rule 78.” *Taylor*, 854 S.W.2d at 392 n. 1. This Court has also held that a motion for additur is an authorized after-trial motion. *Massman Cosntr. Co. v. Missouri Highway & Transp. Comm’n.*, 914 S.W.2d 801, 803 (Mo. banc 1996).

Appellant’s Motion for Rehearing does not appear to be an authorized after-trial motion. Appellant does not cite any rule or statute that allows him to file his Motion for Rehearing. It also does not appear that Appellant’s Motion for Rehearing is a motion for a new trial. In *Eddy* the Court of Appeals held that a motion to vacate a judgment that was granted based upon Rule 61.01 as a sanction for failure to respond to discovery was not an authorized after-trial motion. In that case, the Court did not consider the motion to vacate as a motion for a new trial. The Court held that “the motion to vacate was not directed toward any error of fact or law alleged to have been made by the trial court in imposing such sanction. Rather, Plaintiffs sole ground for relief was counsel’s purported explanation for missing the hearing on Relator’s motion for sanctions.” *Eddy*, 145 S.W.3d at 433.

“A motion for a new trial is a motion directed toward errors of fact or law in the trial.” *Taylor*, 854 S.W.2d at 392. In this case, it is far from clear that Appellant is

alleging errors of fact or law in his Motion for Rehearing. Appellant claims that the Circuit Court erred in many different ways, but it is not clear that those alleged errors are directed toward the facts or the law that the Circuit Court applied in its Judgment.

Because Appellant did not file an authorized after-trial motion, the judgment became final 30 days after the Judgment was entered, which was April 9, 2004. Rule 81.05. Consequentially, Appellant had until October 9, 2004, in which to file his motion to file his notice of appeal out of time. *See* Rule 81.07. Thus, Appellant's Motion for a Special Order Granting Leave for Plaintiff to File a Notice of Appeal out of Time, which was filed on December 20, 2004, was not timely. Therefore, the Court of Appeals was without jurisdiction to grant Appellant's Motion.

II. The Court of Appeals was correct in denying Appellant James R. Berger's Motion for a Special Order Granting Leave for Plaintiff to File a Notice of Appeal Out of Time because Appellant has not shown that his failure to file his Notice of Appeal timely was not due to culpable negligence as required by Rule 81.07.

Appellant alleges that the Court of Appeals erred in denying his Motion for a Special Order Granting Leave for Appellant to File a Notice of Appeal out of Time, because Appellant claims that his failure to timely file a notice of appeal was not due to culpable negligence. Rule 81.07 requires that a party who wishes to file a notice of appeal out of time may only do so "upon a showing by affidavit, or otherwise, that the

delay was not due to appellant's culpable negligence." Rule 81.07. As will be demonstrated below, the Court of Appeals did not abuse its discretion in denying Appellant's Motion, because Appellant did not establish that his failure to file his Notice of Appeal timely was not due to culpable negligence.

Counsel for Appellant filed affidavits in the Court of Appeals giving numerous reasons why his failure to file a timely notice of appeal was not due to culpable negligence. He filed one affidavit that accompanied his Motion for a Special Order Granting Leave for Plaintiff to File Notice of Appeal out of Time, and one accompanying his Motion for Rehearing in the Court of Appeals. Counsel for Appellant claims: (a) medical problems of counsel; (b) computer problems of counsel; (c) assisting indigent prison inmates; (d) the volume of cases Appellant's counsel has assisting prison inmates; and (e) the amount of time it took Appellant's counsel to retrieve his documents after computer damage, as the reasons he failed to timely file his notice of appeal. *See* ¶ 3 (a)-(d), (h) of Counsel for Appellant's Affidavit attached to Plaintiff's Motion for a Rehearing on The Court order of January 4, 2005 Denying Late Notice of Appeal & Alternative Motion for Transfer to the Missouri Supreme Court , Exhibit B to Appellant's Application for Transfer. Appellant essentially claims that this case "fell through the cracks." *See id.* ¶ 3 (j). *See also* Affidavit of Appellant's Counsel accompanying Appellant's Motion for a Special Order Granting Leave for Plaintiff to File Notice of Appeal out of Time.

Appellant's Counsel's claim that this case fell through the cracks is disingenuous, as are the claims that either medical problems, computer problems, and the work load he undertook by assisting indigent prison inmates caused him to miss the deadline for filing his notice of appeal timely. Appellant's Counsel filed Plaintiff's Cancellation of Hearing during the time he could have filed his Notice of Appeal. On June 28, 2004, Plaintiff filed a pleading the Circuit Court canceling a hearing that Appellant previously scheduled for June 29, 2004. Even if the Judgment became final on June 23, 2004, Appellant had ten days from June 23, 2004, in which to file a notice of appeal. Therefore, Appellant could have filed his notice of appeal on the same day as he filed his Cancellation of Hearing. Of course, Appellant could have filed his notice of appeal at any time after the trial court entered its judgment on March 10, 2004, without penalty. *See* Rule 81.05(b). Appellant also could have filed his notice of appeal on the same day in which he scheduled a hearing. It is clear that Appellant did not forget about the hearing on June 29, 2004. In canceling the hearing the day before it was scheduled, it is clear that Appellant's counsel did not forget about the hearing or this case. Neither health, computer, diary or workload problems caused him to neglect that hearing. Yet Appellant chose not to file a notice of appeal.

This case clearly indicates culpable neglect on Plaintiff's part. Even during the ten day time period following June 23, 2004, Appellant filed a pleading in the Circuit Court. Appellant's counsel was clearly thinking about and litigating this case during this time

period. Therefore, any allegation that the reasons Plaintiff did not file a notice of appeal were because of computer, diary, workload or health problems is not borne out by the action taken by Appellant's counsel during this time period. Appellant's counsel took the time to prepare a pleading canceling a hearing during the time period in which he could have timely filed a notice of appeal. However, Appellant did not take the time to complete the short Notice of Appeal form. Appellant merely failed to timely file a notice of appeal.

Appellant has failed to show or to make any convincing argument entitling him to the relief he has requested pursuant to Rule 81.07. Appellant has not shown that his failure to timely file a notice of appeal was not due to culpable negligence. Consequentially, the Court of Appeals did not abuse its discretion when it denied Appellant's Motion.

III. *Kingler v. Director of Revenue*, 281 F.3d 776 (8th Cir. 2002), has no bearing on the issues before this Court; therefore, this Court cannot reverse the decision as Plaintiff requests in his Application for Transfer.

In his Application for Transfer, Plaintiff contends that the denial of his Motion to File a Notice of Appeal Out of Time “manifest[s] a reverse decision to the holding in *Kingler v. Director of Revenue* 281 F.3d 776 (8th Cir. 2002) that ruled the only remedy available to the plaintiff is under Rule 81.07 when there is a showing the late filing was not due to culpable negligence.”

Appellant's argument fails for two reasons. First, the *Kingler* case addresses whether the Missouri Director of Revenue is immune from suit under the Eleventh Amendment to the United States Constitution, when it was alleged the Director violated the Americans with Disabilities Act. *Id.* at 777. This case has absolutely nothing to do with whether Appellant can file his notice of appeal out of time under Rule 81.07.

Second, this Court is not bound by a decision of the Eighth Circuit. *Wimberly v. Labor & Indus. Rel. Com'n. of Mo.*, 688 S.W.2d 344, 347 (Mo. banc 1985) (holding that Missouri courts are bound to only follow United States Supreme Court decisions and not lower federal courts). Therefore, *Kingler* is inapposite.

CONCLUSION

The Court of Appeals did not abuse its discretion when it denied Appellant's Motion for a Special Order Granting Leave for Plaintiff to File a Notice of Appeal Out of Time. Appellant did not file his Motion to File Appeal out of Time within six months of the Judgment becoming final. Therefore, the Court of Appeals did not have jurisdiction to grant Appellant's motion. Additionally, Appellant has not shown that his failure to file a timely notice of appeal was not due to culpable negligence. In fact, even if Appellant's Motion for Rehearing was an authorized after-trial, Appellant filed a pleading canceling a hearing during the time in which he had to file his notice of appeal. Therefore, any assertion that this case fell through the cracks is specious. Furthermore, the case

Appellant cites in his Application for Transfer has nothing to do with filing a notice of appeal out of time in the courts of Missouri.

WHEREFORE for the foregoing reasons, Respondent Cameron Mutual Insurance Company respectfully requests that this Court affirm the Court of Appeals' denial of Appellant's Motion for a Special Order Granting Leave for Plaintiff to File a Notice of Appeal Out of Time and for such other and further relief and the court deems just.

Respectfully submitted,

DYSART TAYLOR LAY
COTTER & McMONIGLE, P.C.

Kent M. Bevan	MO #23626
Matthew W. Geary	MO #53328
4420 Madison Avenue	
Kansas City, Missouri 64111	
(816) 931-2700	
(816) 931-7377 (Fax)	
ATTORNEYS FOR RESPONDENT	
CAMERON MUTUAL INSURANCE	
COMPANY	

CERTIFICATE OF SERVICE

I do hereby certify that on this 13th day of May, 2005, 2 copies of the above and foregoing were mailed, postage prepaid, and properly addressed to:

Don B. Roberson
Attorney at Law
8154 N.W. Kirkwood Avenue
Kansas City, Missouri 64151-1006
ATTORNEY FOR APPELLANT

ATTORNEYS FOR RESPONDENT
CAMERON MUTUAL INSURANCE
COMPANY

RULE 84.06(c) AND RULE 84.06(g) CERTIFICATION

I certify that this Brief complies with the limitations contained in Rule 84.06(b) and contains 3685 words. I rely on the Word Count in the word processing software, which was Microsoft® Word 2003, used to create this Brief.

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

Dated this 13th day of May, 2005.

Kent M. Bevan MO #23626
Matthew W. Geary MO #53328
4420 Madison Avenue
Kansas City, Missouri 64111
(816) 931-2700
(816) 931-7377 (Fax)
ATTORNEYS FOR RESPONDENT
CAMERON MUTUAL INSURANCE
COMPANY

APPENDIX

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