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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-895

VIRGINIA STATE BOARD OF PHARMACY, *et al.*,
Appellants,

v.

VIRGINIA CITIZENS CONSUMER COUNCIL, INC., *et al.*,
Appellees.

On Appeal From The United States District Court For The Eastern District of Virginia

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MOTION TO DISMISS

PRELIMINARY STATEMENT

On January 20, 1975, appellants served and filed their jurisdictional statement seeking review of a unanimous decision of the three-judge court sitting in the United States District Court for the Eastern District of Virginia which enjoined appellants from enforcing §54-524.35(3) Virginia

Code (1972 Supp). It is the position of appellees that the question presented by appellants is substantial, that it meets the requirements for plenary consideration by this Court set forth in Rule 15.1(f), and that a motion to affirm under Rule 16.1(c) is not appropriate. However, appellees believe that this Court lacks jurisdiction over this action because the appeal taken was not timely. In the event that this Court should conclude that the appeal was timely, appellees do not oppose the request of appellants to have this case set down for full briefing and argument although they fully support the decision below.

QUESTION PRESENTED

Is the time for filing a notice of appeal tolled where a motion pursuant to Rules 52(b) and 59 of the Federal Rules of Civil Procedure is filed within the 10 day time limits contained in such Rules, but the motion sets forth only the most general reasons in support thereof and is not accompanied by a brief as required by the Local Rules of the district court in which the action is pending?

RELEVANT AUTHORITIES

28 U.S.C. §2101(b)

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

Rule 4(a), Federal Rules of Appellate Procedure

In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy

or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such

an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Rule 6(b), Federal Rules of Civil Procedure

Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

Rule 7(b)(1), Federal Rules of Civil Procedure

Motions and Other Papers.

An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

Rule 11(F), United States District Court for the Eastern District of Virginia

Briefs Required: All motions, unless otherwise directed by the Court, except motions for (1) a more definite

statement, (2) an extension of time to respond, unless the time has already expired, (3) production of documents, (4) compelling answers to interrogatories, (5) default judgment, (6) objections to interrogatories, and (7) motions relating solely to processes of discovery, shall be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies. The opposing party shall file his response, including a like brief and such supporting documents as are then available, within ten days thereafter. For good cause, the responding party may be given additional time or may be required to file his response, brief and supporting documents within such shorter period of time as the Court may specify.

STATEMENT OF THE CASE

On July 11, 1973, an individual who is in frequent need of prescription drugs and two groups suing on behalf of their members who utilize prescription drugs filed the complaint in this action seeking to declare unconstitutional and enjoin the enforcement of a Virginia statute which prohibits the advertising of the price of prescription drugs, §54-524.35(3) (1972 Supp). As consumers of prescription drugs, plaintiffs claimed that the statute abridged their First Amendment right to receive essential information concerning the prices of these drugs and that the justifications alleged by the State for such restraints were insufficient to support the statute. Accordingly, they contended that their rights under 42 U.S.C. §1983 were violated and that the court had jurisdiction pursuant to 28 U.S.C. §1343(3) to enjoin such violation. The complaint also sought the convening of a three-judge court, which was ordered on July 20, 1973. Discovery proceeded expeditiously, and

the parties thereafter entered into a Stipulation of Facts. Thus, the hearing before the three-judge panel on December 18, 1973, was entirely consumed with an argument on the law.

Slightly more than three months later on March 21, 1974, the court (Bryan, Senior C.J.) rendered its unanimous opinion and entered its order granting the relief sought. After noting the decisions of this Court which recognize the right under the First Amendment to receive information,[1] the court observed that a prior challenge to this statute brought by sellers of prescription drugs, *Patterson Drug Co. v. Kingery*, 305 F.Supp. 821 (W.D. Va. 1969), was not dispositive since the interests of consumers were neither discussed nor represented in that case (App. 7). It further observed that this Court's decision in *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 384 (1973), "somewhat tempers" the claimed exclusion from the First Amendment for commercial advertising enunciated in *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), so heavily relied on by appellants. After noting that similar laws had been stricken down by state courts in Florida, Pennsylvania, and Maryland, the court rejected as not dispositive the other authorities which allegedly support the statute.[2] It found

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[1] Appendix to the jurisdictional statement 6 (hereafter "App") citing *Kleindienst v. Mandel*, 408 U.S. 753, 762-764 (1972) and *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). See also *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

[2] *Head v. New Mexico Bd of Dental Examiners*, 374 U.S. 424 (1963); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935); and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

that none of them dealt with a situation similar to this because here the prospective patient is fully protected by a written doctor's prescription which can be filled only by a licensed pharmacist (App. 8). The justifications offered by the State were thereafter rejected as "not convincingly explained" and "wholly untenable", and the decision was rendered in plaintiffs' favor (App. 9). The court's conclusion in granting the relief sought bears repetition (App. 9):

> The right-to-know is the foundation of the First Amendment; it is the theme of this suit. Consumers are denied this right by the Virginia statute. It is on this premise that we grant the plaintiffs the injunction and the declaration they ask. *Id.*

Although this Court has never overruled *Valentine,* nor specifically limited its applicability, it is doubtful that its broad exclusion of commercial advertising from the First Amendment is still valid. See *Cammarano v. United States,* 358 U.S. 498, 514 (1959) (Douglas, concurring) and *Lehman v. City of Shaker Heights,* 418 U.S. 298, 314 n. 6 (1974) (Brennan, dissenting). Thus, the decision below follows a number of recent lower federal court cases holding that the First Amendment precludes a ban on advertisements which merely provide information about lawful activities. *E.g., Hiett v. United States,* 415 F.2d 664 (5th Cir. 1969), *cert. denied,* 397 U.S. 936 (1970) (advertisements designed to solicit Mexican divorce business); *Associated Students for the University of California at Riverside v. Attorney General,* 368 F.Supp. 11 (C.D. Calif. 1973) (three-judge court; abortion advertisements); *Atlanta Cooperative News Project v. United States Postal Service,* 350 F.Supp. 234 (N.D. Ga. 1972) (three-judge court; abortion advertisements in a newspaper). The result in the district court here, as in those

cases, is readily distinguishable from *Pittsburgh Press, supra,* where the advertisement for a job on a discriminatory and unlawful basis would have aided the commission of an illegal act. Contrary to the assertions of appellants, the decision below follows well-established precedents, albeit none from this Court which are directly controlling. Accordingly, but for the jurisdictional defect relating to the timeliness of the appeal, appellees would agree that the question presented is appropriate for further consideration by this Court.

Because the sole issue on this motion to dismiss is the timeliness of the appeal, appellees have set forth below for the convenience of the Court the significant dates on the left hand side of the page, and on the right hand side have described the events which took place on those dates.

April 1, 1974 — Appellants served and filed a motion pursuant to Rules 52(b) and 59 of the Federal Rules of Civil Procedure, asking that the judgment "be altered or amended or in the alternative that a new trial be granted."[3] Although Local Rule 11(F) of the United States District Court for the Eastern District of Virginia specifically requires that a brief accompany the motion,[4] no brief was submitted with appellants' motion. There was, however, a statement in the motion that "the Memoranda in support of this Motion will be filed within twenty-one days of the receipt of transcript of this matter." (A. 2-3) The only indication of the grounds for the motion was a statement that the motions are made "on all the grounds previously

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[3] See Appendix to this Motion 2 (hereafter "A.").

[4] None of the exceptions applies to motions under Rules 52 or 59. See pp. 4-5, *supra.*

asserted in the Memoranda filed in the above matter and (1) that there remains for decision various pre-trial motions regarding evidentiary matters and (2) that the decision of the court is in conflict with the facts presented and is unnecessarily broad." (A. 2). Accompanying the motion was a letter directed to the clerk of the court requesting "that we be allowed to file our supporting brief within twenty-one days from receipt of the transcript." (A. 1). No request of the court was made to that effect, and neither the court nor the clerk ever granted the extension sought.

April 17, 1974 — The court reporter mailed a copy of the transcript to the appellants and filed the original with the court.

August 29, 1974 — Appellants served their memorandum in support of the April 1st motion (A. 4-10). That memorandum specifically excluded reliance on a claim of failure to admit relevant evidence, as appellants conceded that the transcript showed that all disputed items had been admitted (A. 5). It simply reargued the case and then sought to persuade the court to vacate its decision on account of certain advertisements which appeared subsequent to the March 21st ruling.

September 3, 1974 — Appellees served their reply which pointed out that appellants had been sent a copy of the transcript on April 17, 1974, and that by their own promise the memorandum was due on May 8, 1974, but was not filed until three and one half months later (A. 11-12). These assertions were never disputed by appellants.

October 4, 1974 — The court entered an order denying the motion of the appellants (App. 1)

November 4, 1974 — Appellants filed their notice of appeal in the district court.

It is the contention of appellees that because the notice of appeal was not filed until well beyond the 60 days authorized by 28 U.S.C. §2101(b), and because appellants took no action which effectively tolled the period for filing the notice of appeal, the appeal is not timely, and this Court lacks jurisdiction over it.

ARGUMENT

THE APPEAL IS NOT TIMELY

1. Introduction

Section 2101(b) of Title 28 requires that appeals such as this be taken by the filing of a notice of appeal within 60 days from the entry of the order being appealed. It is clear that the filing of a notice of appeal on November 4, 1974, was far beyond the 60 days allowed for appealing the order of March 21, 1974, and that therefore, unless the period for perfecting an appeal was tolled during that time, the appeal from the original order is untimely.

Section 2101(b) contains no tolling provisions such as those contained in Rule 4(a) of the Federal Rules of Appellate Procedure. However, that latter provision applies only to appeals to court of appeals, not to this Court. Appellees are unaware of any case in which the question of tolling under section 2101(b) has been raised, but we believe that there is no reason for the Court not to interpret section 2101(b) to include a tolling provision where tolling would

have occurred if the appeal had been taken to a court of appeals.[5] That result is supported by *United States v. Healey,* 376 U.S. 75 (1964), in which it was held that a timely petition for rehearing tolled the time for applying to this Court for certiorari in a criminal case, even though no rule specifically provided for such a tolling.

However, if appellants are to benefit from the tolling provisions of Rule 4(a), they must also accept the other conditions of that Rule. This includes a requirement that the tolling motions under Rules 52(b) and 59 be timely, and this condition appellants cannot meet. Although appellants served and filed within the ten days allotted a document entitled "MOTION TO AMEND FINDINGS OR JUDGMENT OR IN THE ALTERNATIVE FOR A NEW TRIAL," which cited Rules 52(b) and 59 (A. 2), the motion was so insufficient as a matter of law that it cannot constitute a timely filing for purposes of tolling the limitation on filing an appeal. The insufficiency is based on two separate factors: first, contrary to the Local Rules, a brief did not accompany the motion, and second, the grounds stated in the motion itself were so general and vague that the court could neither grant nor deny the motion until a further submission was made.[6] Since that submission

[5] This Court in *United States v. Crescent Amusement Co.,* 323 U.S. 173, 177 (1944), ruled that a timely motion to amend findings would toll the period for taking an appeal, without addressing the question of whether the predecessor of section 2101(b) permits a tolling where none is specified in it, but is specified in other similar review provisions.

[6] The court docket reflects the fact that the panel members were sent copies of the motion when it was filed, but they took no action until the memorandum was submitted.

was not made until almost five months after the motion itself was filed, in effect, all that appellants did within the ten days was to seek an extension of time to make their motion until some indefinite time in the future. But Rule 6(b) of the Federal Rules of Civil Procedure specifically prohibits even the district court from granting an extension of time for the filing of motions under Rules 52(b) and 59, and thus it is clear that a party cannot do so on its own. Accordingly, if appellees are correct in their contention that no timely motion was filed on April 1, 1974, this appeal must be dismissed for want of jurisdiction.

2. No Timely Motion Was Filed On April 1, 1974

The first basis for our contention that appellants made no timely motion is that they did not comply with Rule 11(F) of the Eastern District of Virginia which specifically requires that a "written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies" accompany motions such as these. The appellants post-trial motion acknowledges the necessity for a memorandum (A. 2-3), as does their accompanying letter to the clerk of the court which requested a period of 21 days after the receipt of the transcript of the hearing within which to file their memorandum (A. 1). This Court need not decide whether a memorandum filed within the 21 days requested would have made the motion timely, for appellants not only failed to comply with the 21 days, but took over four and one-half months before submitting their memorandum, thereby exceeding the 10 days allowed by Rules 52(b) and 59 by nearly five months.

In addition to the requirement of Local Rule 11(F), it has been held that in a motion for a new trial grounds not

contained in a brief will not be considered by the court. *Leahy v. Travelers Ins. Co.*, 42 F.Supp. 26, 28 (S.D. Ohio 1941). The basis for such a ruling is the requirement of Rule 7(b)(1) of the Federal Rules of Civil Procedure that every motion shall "state with particularity the grounds therefor . . . ." As one court observed where a moving party failed to file a memorandum or other supporting papers:

> . . . it is not believed that this court is required to search its memory and the record in an endeavor to acquaint itself with the alleged errors in the trial of the case. *Lynn v. Smith,* 193 F.Supp. 887, 888 (W.D. Pa. 1961).

Therefore, we respectfully suggest that the failure to file an accompanying brief within the 10 days required by Rules 52(b) and 59 is a sufficient basis under these circumstances to conclude that there was no timely motion made, and hence the period for filing a notice of appeal was not tolled.

Even if this Court should conclude that a brief is not an absolute requirement, the motion itself must adequately state the grounds upon which it is to be granted, and on that basis, this motion is clearly insufficient. *Marshall's U.S. Auto Supply, Inc. v. Cashman,* 111 F.2d 140, 142 (10th Cir.), *cert. denied,* 311 U.S. 667 (1940). Appellants here simply moved on "all the grounds previously asserted," and then added the grounds that "there remains for decision various pre-trial motions regarding evidentiary matters and . . . the decision of the Court is in conflict with the facts presented and is unnecessarily broad." (A. 2). Such grounds are, in the words of the Eighth Circuit, "no more than barren

assertions", and the motion is "completely unbuttressed by the particulars required in Rule 7(b)(1), Federal Rules of Civil Procedure." *Chicago & Northwestern Ry. Co. v. Britten,* 301 F.2d 400, 402 (1962). Or as another court observed in a case in which the grounds for the post-trial motions were stated in terms analogous to those advanced here, "the general conclusions assigned as error in the motion for a new trial are vague, indefinite and lack the specificity required by Rule 7(b)(1) . . ." *Stinebower v. Scala,* 331 F.2d 366, 367 (7th Cir. 1964). In other cases the courts have held that a failure to assign the reasons for a motion within the required 10 day period is a sufficient basis to conclude that no timely motion had been made. *Fine v. Paramount Pictures, Inc.,* 181 F.2d 300 (7th Cir. 1951).[7]

In order to judge the sufficiency of the motion here, this Court might well consider the problem facing appellees, who were called upon to "respond" to the April 1st "motion", and the district court which was asked to decide it. From appellees' point of view, the motion simply said that the court was wrong for all the reasons that had not convinced the court before. Thus, there was nothing further which appellees could then have done other than to resubmit all of their prior memoranda. From the court's point of view, there was nothing it could do since there was nothing before it on which it could act. Compare *United*

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[7] However, where a written statement of reasons has been provided within the 10 days allowed, the courts have permitted supplemental filings outside the 10 days to complete the reasons given. *Douglas v. Union Carbide Corp.,* 311 F.2d 182, 185 (4th Cir. 1962).

States v. Healey, supra, 376 U.S. at 80, where this Court indicated that it would be "senseless" for it to pass on an issue while a petition for rehearing is "under consideration" by the lower court. It is obvious here that there was nothing for the district court to consider because there was nothing of any substance before it. Plainly, this is not a case where the court could "comprehend the basis of the motion and deal fairly with it," in which case "technicalities ought to be avoided." *McGarr v. Hayford,* 52 F.R.D. 219, 221 (S.D. Calif. 1971). The motion here was so insufficient as not to constitute a motion at all for the purposes of tolling the time to file an appeal.[8]

One court has observed that the degree of specificity required by Rule 7(b)(1) is "by no means clear" although it found that the "courts have generally given a liberal interpretation" to it. *Harkins v. Ford Motor Co.,* 437 F.2d 276, n. 1 (3rd Cir. 1970). That court also observed that in the context of motions for a new trial the grounds must be stated "with sufficient specificity to put the opposing party on notice as to the reasons put forward for the

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[8] The statement by the court in *Yanow v. Weyerhaeuser Steamship Co.,* 274 F.2d 280, 283 (9th Cir. 1959), *cert. denied,* 362 U.S. 919 (1960), to the effect that a motion under Rule 59 is still proper even if it is so defective that it cannot be granted, must be considered in light of the peculiar facts of that case. The language was part of an alternate holding needed by the Ninth Circuit to sustain a denial of an attempt by a losing party to reopen a prior decision of that court, on the grounds that the original appeal was untimely and hence jurisdictionally defective. Whether the unique circumstances of that case justify the language used to support that result is irrelevant, since the instant facts are plainly distinguishable from those in *Yanow.*

granting of a new trial." *Id.* at 277.[9] Even by such a "liberal interpretation," the motion here failed to provide the requisite notice. We submit that Rule 7(b)(1) must be given meaning and that it does not "establish a mere technical requirement," but one which can be satisfied where a reading of the motion and the papers referred to in it "can leave no doubt as to the theory upon which [the movant] is proceeding." *United States v. Krasnov,* 143 F.Supp. 184, 196 (E.D. Pa. 1956), *aff'd,* 355 U.S. 5 (1957). It is a requirement that cannot be met by general allegations, but can be satisfied by "reasonable specification" of the grounds for the motion. *United States v. 64.88 Acres of Land, etc.,* 25 F.R.D. 88, 90-91 (W.D. Pa. 1960). Judged by any of the above standards, however phrased, the motion of appellants cannot meet the requirements of Rule 7(b)(1).

It is essential that Rule 7(b)(1) be strictly enforced with regard to motions under Rules 52(b) and 59, since Rule 6(b) specifically prohibits the trial judge from extending the time to make those motions. To hold that the kind of general allegations made here satisfy those Rules, would permit a losing party to file a single sheet of paper and delay until a time of his own choosing the date for

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[9] In 1966, Rule 59(d) was amended in respects not material to this action. The Advisory Committee Notes accompanying it discuss the requirement of particularity under Rule 7(b)(1) and conclude that it is equally applicable to all motions for new trials and that it "does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on." See 28 U.S.C.A., Rules 59-76, p. 15 (1970). The cases cited in the Advisory Committee Notes, however, do not deal precisely with the situation before this Court.

completing the motion, thereby effectively thwarting the no-extension provisions of Rule 6(b). As this Court observed in *Matten Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943):

> The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed appeal has been made . . . . Any other construction of the statute would defeat its purpose. Would-be appellants could prolong indefinitely the appeal period by making applications [contrary to the particular rules at issue there].

Or, as this Court stated in denying the government the benefit of a tolling provision in *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 213 (1952), the purpose of the rule is to "encourage applicants to this Court to take heed of another principle — the principle that litigation must at some definite point be brought to an end." It is apparent that the purposes enunciated in these two decisions by this Court would be violated by permitting the appellants here to prolong the period of uncertainty in the district court by failing to follow the procedural requirements for making motions under Rules 52(b) and 59. Accordingly, the Court should hold that no timely motion was made under those Rules, and hence the appeal period expired long before appellants filed their notice of appeal.

3. There Are No "Unique Circumstances" Justifying A Departure From The Rules

Rule 6(b) is clear in its statement that the time for making post-trial motions cannot be enlarged by the district court. As this Court observed in another context, ". . . the time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged." *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co, supra,* 344 U.S. at 211. There are, however, decisions of this Court which have held that untimely petitions for rehearing, if considered on the merits by the court below, can reinstate the right to appeal by making a judgment not final until denial of the petition for rehearing. See *e.g., Bowman v. Loperena,* 311 U.S. 262 (1940). Those decisions, of course, antedate the Federal Rules of Civil Procedure as they now exist, in particular the no-extension provision of Rule 6(b), and hence they are no longer authority upon which appellants may rely. *Raughley v. Pennsylvania Ry. Co.,* 230 F.2d 387, 390 (3rd Cir. 1956).

Nonetheless, in spite of the clarity with which Rule 6(b) is written, this Court has permitted certain exceptions to it in what it has described as "unique circumstances." See *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 217 (1962); *Thompson v. Immigration and Naturalization Service,* 375 U.S. 384 (1964); and *Wolfsohn v. Hankin,* 376 U.S. 203 (1964). In construing these decisions, the lower courts have unanimously concluded that the element of judicial intervention — judicial misleading of the party seeking the appeal into believing that a valid extension had been granted — has been the key element. See *Lord v. Helmandaller,* 348 F.2d 780, 782 n. 3 (D.C.

Cir. 1965), *cert. denied,* 383 U.S. 928 (1966), and *Motteler v. J. A. Jones Construction Co.,* 447 F.2d 954, 955 (7th Cir. 1971) (exception applies ". . . where the late filing resulted from the litigant's reliance on a district court's erroneous grant of an extension of time within which to file a motion which, if properly filed, would terminate the running of the time for filing an appeal.") See also *Vine v. Beneficial Finance Co.,* 374 F.2d 627, 632 (2d Cir.), *cert. denied,* 389 U.S. 970 (1967), finding an exception where a stipulation extending the time to move was entered into within the relevant time period, and the court by continuing its consideration beyond the time for appeal, was held to have retroactively approved the stipulation.

The situation here is far different because there is not the slightest indication of judicial intervention of any kind. The "mere filing in court of a motion notice for hearing in due course is not such active court involvement in misleading a party as to invoke what has been called the *Thompson-Wolfsohn* rationale." *Flint v. Howard,* 464 F.2d 1084, 1086 (1st Cir. 1972). Appellants here simply indicated in their motion that they intended to file a memorandum and made a request to the clerk for permission for late filing, a request to which they received no reply from the clerk, let alone from the court. Even the filing of a motion for an extension addressed to the court has been held to be insufficient to toll the time for taking an appeal, *Wagoner v. Fairview Consolidated School District No. 5,* 289 F.2d 480 (10th Cir.), *cert. denied,* 368 U.S. 921 (1961), and the request to a clerk is surely no stronger a case for relief.

Moreover, this is not a case like *Yanow v. Weyerhaeuser Steamship Co., supra,* 274 F.2d at 276 n. 2, where the

party who was granted an extension filed within that additional time allowed. Appellants here requested their own deadline which, although never approved, would have expired on May 8, 1974. Yet with no justification even offered, it was not until August 29, 1974, that they filed their memorandum in support of their motion. This is also not a case involving a layman where the Court might give special consideration to the status of the party seeking to appeal. See *Pierre v. Jordan,* 333 F.2d 951 (9th Cir. 1964), *cert. denied,* 379 U.S. 974 (1965). The Attorney General of the Commonwealth of Virginia, who frequently represents clients in both the United States District Court for the Eastern District of Virginia and this Court, is and has been counsel to appellants from the start. There is simply no reason here to abandon the procedural requirements of the Rules, and accordingly because this Court lacks jurisdiction of this appeal, *United States v. Robinson,* 361 U.S. 220, 229 (1960), it must be dismissed.

CONCLUSION

For the foregoing reasons the appeal of the appellants should be dismissed.

Respectfully submitted,

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February 21, 1975

APPENDIX

COMMONWEALTH OF VIRGINIA
[Seal]
OFFICE OF THE ATTORNEY GENERAL
SUPREME COURT BUILDING
1101 East Broad Street
Richmond, Virginia 23219
804-770-2071

April 1, 1974

The Honorable W. Farley Powers, Jr.
Clerk, U.S. District Court
Eastern District of Virginia
Post Office Building
10th and Main Streets
Richmond, Virginia 23219

Re: Virginia Citizens Consumer Council, Inc., et al.
v. State Board of Pharmacy, et al.
Civil Action No. 73-336-R

Dear Mr. Powers:

Enclosed herein is a Motion which I would appreciate your presenting to the Court and filing accordingly. I have spoken with opposing counsel and though we could not agree on a time for filing a Memoranda, it is requested that we be allowed to file our supporting brief within twenty-one days from receipt of the transcript. I am, by copy of this letter, requesting Mr. Gilbert Halasz to provide the transcript portion concerning the pre-trial motions.

Thank you for your cooperation.

Sincerely,
/s/ Anthony F. Troy
Anthony F. Troy
Deputy Attorney General

AFT:gt
Enclosures
cc: Mr. Gilbert Halasz
Court Reporter
Post Office Building
10th and Main Streets
Richmond, Virginia 23219

Raymond T. Bonner, Esquire

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Virginia Citizens Consumer Council, Inc., Virginia State AFL-CIO, Lynn B. Jordan, Plaintiffs,	)	Civil Action
v.	)	No. 73-336-R
State Board of Pharmacy, Thomas F. Marshall, Jr., Charles F. Kingery, Wallace B. Thacker, Linwood S. Leavitt, William R. Maynard, Jr., Defendants.	)	

MOTION TO AMEND FINDINGS OR JUDGMENT
OR IN THE ALTERNATIVE FOR A NEW TRIAL

The defendants, Virginia State Board of Pharmacy, *et al.*, move the Court pursuant to Rules 52(b) and 59 of the Federal Rules of Civil Procedure that the judgment in the above-captioned matter, entered on March 21, 1974, be altered or amended or in the alternative that a new trial be granted. Such motions are made on all the grounds previously asserted in the Memoranda filed in the above matter and (1) that there remains for decision various pre-trial motions regarding evidentiary matters and (2) that the decision of the Court is in conflict with the facts presented and is unnecessarily broad. The Memoranda in

support of this Motion will be filed within twenty-one days from the receipt of transcript of this matter.

STATE BOARD OF PHARMACY, THOMAS F. MARSHALL, JR., CHARLES F. KINGERY, WALLACE B. THACKER, LINWOOD S. LEAVITT AND WILLIAM R. MAYNARD, JR.

By: /s/ Anthony F. Troy
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1101 East Broad Street
Richmond, Virginia 23219

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond, Virginia

Virginia Citizens Consumer Council, Inc., Virginia State AFL-CIO, Lynn B. Jordan,

Plaintiffs,

v.

Civil Action No. 73-336-R

State Board of Pharmacy, Thomas F. Marshall, Jr., Charles F. Kingery, Wallace B. Thacker, Linwood S. Leavitt, William R. Maynard, Jr.,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO AMEND FINDINGS OR JUDGMENT OR; IN ALTERNATIVE, FOR A NEW TRIAL

In its opinion entered herein on March 21, 1974, this Court stated that the sole issue in this case was "whether the State may legally exclude from publication prescription drug prices *not otherwise fairly available* to those consumers who vitally need the drugs, . . ." Opinion, p. 6. Working from the factual conclusion stated in the issue, the Court struck down the Virginia statute prohibiting the advertisement of prescription drugs on the basis that the statute violated the consumers' "right-to-know" protected by the First Amendment. In so doing, the Court refused to ascribe any infirmity to the decision of the three-judge court in *Patterson Drug Co. v. Kingery,* 306 F. Supp. 821 (W.D. Va. 1969) which upheld the

constitutionality of the identical statute against a First Amendment attack.

The defendants have filed a motion, pursuant to Rules 52(b) and 59 of the Federal Rules of Civil Procedure, requesting that the judgment entered herein be altered or amended or, in the alternative, that a new trial be granted on the basis that (1) there remains for decision various pre-trial motions regarding evidentiary matters and (2) the decision is in conflict with the facts and is unnecessarily broad.

Since filing the aforesaid motion, the defendants have received and studied the transcript of the proceedings herein held on December 18, 1973. It is clear from the transcript (page 11) that the matters sought to be introduced by the defendants have been admitted into evidence by the Court. There is no need, therefore, to discuss at this time the first ground supporting this motion. The defendants respectfully submit, however, that the admission of that evidence bolsters the second basis of the instant motion.

As stated above, this Court's statement of the issue in this case assumed that prescription drug price information is not now available to the public and will not be available unless pharmacists are permitted to advertise such information. It is submitted that this assumption, on which the Court's opinion is entirely bottomed, has no factual support in the record. On the contrary, the evidence before this Court clearly shows that drug price information is easily accessible to the consumer. Any individual may obtain such information by merely calling or going by the pharmacy and requesting it.

It is patently obvious that this Court's decision has not had the least salutory effect on consumers. Advertisements which have appeared subsequent to the decision have not quoted prices. They merely set forth an invitation for consumers to call and get price or discount information, the very thing permitted by the statute prior to the decision. See Appendix A. Thus, not only is the record bankrupt of support for this Court's factual assumption, but the assumption is also contradicted by the practice.

In addition to the fact that price information is easily available to the consumer, the Court's decision completely overlooks the reasons why advertising should be prohibited, all of which are amply supported by the evidence. The pharmacists' role cannot be said to be narrowly limited to the sterile act of filling a prescription. As the record adequately demonstrates, the pharmacist, as a professional, acts as a monitor to ensure that a patient is not taking drugs prescribed by different doctors which, while taken separately have beneficial effects, when taken together might have harmful effects on the patient. Only pharmacists can perform this integral and necessary function since many times doctors may be unaware of other medication being taken by the individual. This Court's decision will have the direct effect of causing consumers to be deprived of this invaluable "benefit to the public", *Patterson, supra,* at 824, by allowing pharmacists to lure them into their pharmacy by means of "loss leaders" and other gimmicks calculated not to aid the patient, but to increase profits.

Even if there exists a constitutionally protected "right-to-know", a right which the defendants earnestly contend does not exist, there is no constitutionally protected right to receive information in any particular form, much less in

the form of an advertisement. Thus, by holding that only dissemination of prescription drug prices through the medium of advertising will fairly meet the "right-to-know," the scope of this Court's order is far too broad. The means of dissemination of information recognized by this Court to be available under the statute in question adequately meets any "right-to-know" test and provides ample support for a finding by this Court that the statute is constitutional.

STATE BOARD OF PHARMACY, THOMAS F. MARSHALL, JR., CHARLES F. KINGERY, WALLACE B. THACKER, LINWOOD S. LEAVITT AND WILLIAM R. MAYNARD, JR.

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Date of Birth (Month) (Day) (Year)
Social Security No.
Signature
Date

Date of Birth (Month) (Day) (Year)
Social Security No.
Signature
Date

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NOW SAVE 10% WITH REVCO'S SENIOR CITIZENS DISCOUNT PRESCRIPTION PLAN!

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Over one-million people are already enrolled in this special, money-saving program for Senior Citizens. Now you can join, too..

Just fill out the application blank above and take it to any Revco Drug Center near you. Without cost or obligation, you'll receive a Membership Card entitling you to your special discounts. Then show the card whenever you make a purchase and see how the savings add up.

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Call us! We're so sure our prescription prices are lower, we'll tell you the cost of your prescription by phone. Then compare! You get the same high quality but you pay less at Revco.

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[illegible] East Belt Blvd., 233-6986
3158 West Cary Street, 353-7867
King Shopping Center, Jeff Davis Highway, 271-6014
Midlothian Mall, Rt. 60 at Germain S. Road, 233-2787
Colonial Square Shopping Center, U.S. 1 & 301 & Starkie Avenue, 526-2233

Every Day is Savings Day and That's For Sure at Revco!

Exhibit "A"

[EXHIBIT "A"]

[EXHIBIT "B"]

[EXHIBIT "C"]

A-22 Richmond Times-Dispatch, Sun., May 19, 1974

ɔaign Purse Overflowing

of Bumpers' support comes from local Arkansans, despite the continuing rumors that the Eastern Jewish community has offered to contribute money to Bumpers. Fulbright has been unpopular with some Jewish groups because of what they consider his lack of support for Israel in the Middle Eastern controversy.

Bumpers, according to sources close to his campaign, deliberately set a $1,000 limit on individual contributions and insisted that he be informed of all out-of-state contributions. The sources said Bumpers' campaign would be harmed if he received widespread out-of-state Jewish support.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

VIRGINIA CITIZENS CONSUMER COUNCIL, INC., *et al.*, Plaintiffs,	)	Civil Action
v.	)	No. 73-336-R
STATE BOARD OF PHARMACY, *et al.*, Defendants.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO AMEND FINDINGS OR IN ALTERNATIVE FOR A NEW TRIAL

Plaintiffs oppose defendants' motion to amend the findings or in the alternative for a new trial on the grounds that (1) the motion has not been filed within the time required by the Federal Rules of Civil Procedure and (2) there is no legal support for said motion, the primary basis for which being the defendants' disagreement with this Court's decision.

Rules 52 and 59 of the Federal Rules of Civil Procedure both require that motions made pursuant thereto *shall* be served within 10 days after the entry of judgment. Defendants attempted to comply with this 10-day requirement by filing the notice of their motion within such time, but their motion was incomplete for it was not accompanied by any supporting memoranda. Instead of filing such memoranda they requested the Court to permit them to file the same within 21 days after receiving the transcript.

Not only did the Court not grant this request, but it is plaintiffs' understanding that defendants received the transcript on April 17, 1974. Thus, not only have defendants not complied with the Rules, but they have also not fulfilled their representation to this Court, and, now, more than 5 months after the Court's decision are making their motions. There is simply no basis for allowing defendants to file their motion at this time, and there are obvious reasons for requiring attorneys to comply with the rules.

Even if there were some provision for allowing the late filing of this motion there is no substantive justification for its being granted. Defendants no longer base their motion on the Court's supposedly having improperly excluded some evidence. The basis of their motion is simply that the facts do not support the Court's decision. In essence their motion is that they disagree with the Court. If defendants thought the Court's decision was not supported by the facts, they should have appealed to the United States Supreme Court, which they have not done within the time required. 28 U.S.C. §2101(b).

Finally, defendants ask this Court to reconsider its decision because of events *subsequent* to the trial. Not only are these subsequent events obviously irrelevant, but they do not support defendants' position that advertising has not aided the consumer. For example, all of the ads which defendants attached to their motion tell persons over 60 years of age that they are entitled to 10% discounts. This obviously vital information could not have been disseminated prior to this Court's ruling that §54.-524.35(3) of the Code of Virginia is unconstitutional.

Plaintiffs respectfully submit that defendants' motion must be denied.

Respectfully submitted,

/s/ James W. Benton, Jr.

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[Certificate of Service]