

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

CRYSTAL McGEE, ET AL.,)	
)	
Plaintiffs,)	Case No. 2:11CV00035
)	
v.)	OPINION AND ORDER
)	
VIRGINIA HIGH SCHOOL LEAGUE, INC.,)	By: James P. Jones
)	United States District Judge
Defendant.)	

Hugh F. O'Donnell, Client Centered Legal Services of Southwest Virginia, Norton, Virginia, for Plaintiffs; R. Craig Wood and Aaron J. Longo, McGuire Woods LLP, Charlottesville, Virginia and Charlotte, North Carolina, for Defendant.

The plaintiffs, whose Complaint was dismissed by the court, have submitted a Motion to Extend the Time for Filing a Notice of Appeal. Upon review of the record, I find that the motion should be granted.

On September 28, 2011, I granted the defendant's Motion to Dismiss and dismissed with prejudice the plaintiffs' action challenging the Virginia High School League's "transfer rule." On October 25, 2011, before the expiration of the time for filing an appeal,¹ a volunteer assistant for plaintiffs' counsel attempted to electronically file an appeal using the ECF program. The assistant attached a copy of the notice of appeal and entered the relevant credit card information. When she

¹ Plaintiffs' notice of appeal was due on or before October 28, 2011.

received verification that the payment of the filing fee had been accepted, she mistakenly believed that the notice had been successfully docketed. A few days later, having not received confirmation of the appeal, plaintiffs' counsel contacted the clerk's office and learned of the problem. By that time, however, the deadline for filing a notice of appeal had already expired.

The plaintiffs request that the court extend the time to file a notice of appeal. They argue that the volunteer assistant had never filed a non-indigent notice of appeal in federal court, and that she was generally inexperienced with the federal electronic filing system.

In a civil suit, a notice of appeal must be filed within thirty days of the entry of the judgment. Fed. R. App. P. 4(a)(1). This limitation is “mandatory and jurisdictional.” *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982)). However, pursuant to Federal Rule of Appellate Procedure 4(a)(5), a district court may extend the time for filing a notice of appeal if a party shows “excusable neglect or good cause.” The plaintiffs' motion asserts excusable neglect by counsel, and I will evaluate the motion on that ground.

In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993), the Supreme Court set forth the factors to be considered in determining

whether excusable neglect exists. They are: (1) danger of prejudice to the opposing party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. *Id.* at 395. The Fourth Circuit adopted the *Pioneer* factors for the purpose of Rule 4(a)(5) in *Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530, 533 (4th Cir. 1996).

In this case, the defendant argues that the plaintiffs have failed to establish the requisite showing necessary in order to extend the time for filing a notice of appeal. It contends that the reason for delay, namely, inexperience with electronic filing and with cases involving payment of fees, is not a satisfactory justification for the late filing. The defendant does not argue that it will be prejudiced by the appeal going forward, nor does it discuss the length of delay, its potential impact on the judicial proceedings, or whether the plaintiffs acted in good faith.

After careful examination, I find that the *Pioneer* factors weigh in favor of the plaintiffs. There is not a significant danger of prejudice to the defendant in allowing the appeal to go forward. Furthermore, the length of delay is not extensive and there is no evidence of bad faith on the part of the plaintiffs. While it was certainly neglect for plaintiffs' counsel to entrust such an important task to someone with little experience, the facts are sufficient to show that the neglect was excusable.

Mandatory electronic filing is still relatively new, and mistakes with the electronic filing system may be adequate grounds for an extension of time to appeal. *See, e.g., Curry v. Eaton Corp.*, No. 1:07-CV-5-R, 2008 WL 4542308 (W.D. Ky. Oct. 9, 2008). Taking into account all of the relevant circumstances surrounding the plaintiffs' omission, I conclude that the plaintiffs have shown excusable neglect.

For the stated reasons, it is hereby **ORDERED** that the Motion to Extend Time for Filing a Notice of Appeal (ECF No. 36) is GRANTED and the time to file a Notice of Appeal is extended for a period of 14 days after the date of entry of this Order. *See* Fed. R. App. P. 4(a)(5)(C).

ENTER: December 2, 2011

/s/ James P. Jones
United States District Judge