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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

South Carolina Administrative Law Court Case No. 20-ALJ-30-0276-CC

Nicholas B. Thompson,

Appellant,

-vs-

South Carolina Public Employee Benefit Authority,
South Carolina Retirement Systems,

Respondent.

PETITION FOR REHEARING

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Appellant Nicholas B. Thompson files this petition for rehearing.

Rehearing is appropriate because the Court's order has the effect of dismissing or finally deciding his appeal, Rule 221(c), SCACR. Moreover, Appellant has not had an opportunity to be heard on the issues giving rise to the dismissal.

Appellant, a firefighter contesting the denial of his disability retirement benefits, received a Final Order of the South Carolina Administrative Law Court denying his application on June 29, 2022. Counsel for Appellant timely filed Appellant's Notice of Appeal with this Court on July 29, 2022 via the Court's Court of Appeals Filings email address, ctappfilings@sccourts.org. On that same day, counsel for Appellant served

Respondent South Carolina Public Employee Benefit Authority via email and filed a proof of service providing confirmation of this. Also on July 29, 2022, the Clerk's office emailed Appellant's Counsel a letter, noted a deficiency—that “[a] proof of service showing that a copy has been served on the Administrative Law Court has not been provided as required by Rule 203(d)(2)(B)(i), SCACR.” The letter provided “that any deficiency must be corrected within ten (10) days of the date of this letter or your appeal will be dismissed.” Appellant's counsel and his staff understood the Court's letter as requiring Appellant to serve the Administrative law clerk within ten days and to provide proof of service to the Court.

On August 4, 2022, within ten days of the July 29, 2022 letter, Appellant's counsel placed the Notice of Appeal in the mail to the Administrative Law Court and filed a Proof of Service confirming this. The Court dismissed the Appeal in its August 10, 2022 order, noting that the Notice of Appeal was not served more than 30 days after receipt of the decision. Appellant respectfully requests a rehearing of that order for the reasons set forth below.

1. Service on the Administrative Law Court is not jurisdictional, and therefore this Court has discretion to consider the appeal timely.

The Court's order dismissing this appeal relies upon *Elam v. S.C. Dep't of Transp.* for the proposition that “the requirement of service of the notice of appeal is jurisdictional.” 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). However, the Court's holding in *Elam* is more specific than this. The Court noted in that case that “[t]he notice of appeal in a case appealed from the Court of Common Pleas must be served on all *respondents* within thirty days after receipt of written notice of entry of the order or judgment. *Id.*, citing Rule 203(b)(1), SCACR [emphasis added]. In *Elam*, the issue was whether the Notice of

Appeal was timely served on the respondent in that case, not whether, as in the present case, it had been timely filed with the lower court.

In the present case, Appellant served the only respondent—the Public Employee Benefits Authority—within the time period necessary for this Court to establish jurisdiction of the case. While filing of the Notice of Appeal with the Administrative Law Court is required by S.C. Code Ann. § 1-23-610, that requirement is not itself a jurisdictional requirement, as the ALC is not a “respondent.” Since filing of the Notice of Appeal with the ALC is not a jurisdictional matter, this Court has discretion to consider whether the appeal should be accepted as timely based upon legal and equitable principles.

2. Appellant complied with the Court’s directive to provide proof of service on the Administrative Law Court within ten days.

Appellant’s counsel understood the language of the Court’s letter to require service upon the ALC within ten days of the date of the letter, and that if he did not do so, the appeal would be dismissed. While that interpretation is not consistent with S.C. Code § 1-23-610, it is not an unreasonable understanding considering that other types of appeals provide a ten-day period for Appellants to file the Notice of Appeal at the lower court. See, e.g. Rule 203(B), SCACR, (providing that, in appeals from the Circuit, Family, and Probate courts, “the notice of appeal shall be filed with the clerk of the lower court and the clerk of the appellate court within ten (10) days after the notice of appeal is served”.) Appellant counsel complied with the instruction to correct the deficiency within the period of time stated in the letter

3. It is appropriate for this Court to equitably toll the ten-day period for the Appellant to appeal on the Administrative Law Court based upon the language of the July 29, 2022 letter.

It is appropriate for this Court to equitably toll the deadline for Appellant to file the Notice of Appeal with the ALC. Our Supreme Court has recognized that "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115-16, 687 S.E.2d 29, 32-33 (2009), citing 54 C.J.S. Limitations of Actions § 115 (2005). The Court has recognized that "Equitable tolling is a nonstatutory tolling theory which suspends a limitations period." *Id.*, citing *Ocana v. Am. Furniture Co.*, 2004 NMSC 18, 135 N.M. 539, 91 P.3d 58, 66 (N.M. 2004). Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. *Id.*, citing *Rodriguez v. Superior Court*, 176 Cal. App. 4th 1461, 98 Cal. Rptr. 3d 728 (Ct. App. 2009). "Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period 'to ensure fundamental practicality and fairness.'" *Id.* at 736 (citation omitted). The doctrine of equitable tolling, unlike equitable estoppel, does not require deception or misrepresentation by the defendant; rather, it serves to ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits). *Id.*, citing *Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1134 (Fla. 1988).

In the present case, the deadline to file a notice of appeal with the ALC operated as a statute of limitations. Appellant counsel's understanding that the letter required service on the ALC, and filing of proof of service, within ten days of the date of the letter, was reasonable, particularly considering that the ten-day requirement matches the requirement for filing the notice of appeal in several other types of cases. Weighing most

heavily in favor of equitable tolling is the fact that strict adherence would punish Appellant, a firefighter injured in the line of duty, and close the courthouse door to his seeking redress of his case due to his counsel's misunderstanding of a nonjurisdictional technical requirement. That would be a terribly harsh result.

Conclusion

For these reasons, Appellant respectfully requests that this Court grant rehearing of its previous order dismissing his appeal.

Respectfully,

s/Jack E. Cohoon

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