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Dec 21 2022

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

Appellate Case No.: 2021-000007

Andrew Davis Desilet Appellant,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety Respondents.

Unpublished Opinion No. 2022-UP-435

PETITION FOR REHEARING

s/Larry C. Marchant, Jr.
S.C. Bar No. 102071
1720 Main St., Suite 301
Columbia, South Carolina 29201
Telephone: 803-771-1507
Email: larry@larrycmarchant.com
Attorney for Appellant/Petitioner

Pursuant to Rules 221 and 240, SCACR, the Appellant Andrew Davis Desilet respectfully moves the Court for a rehearing and/or to alter its opinion no. 2022-UP-435 of December 7, 2022, which affirmed the Administrative Law Court's granting the South Carolina Department of Motor Vehicles' (DMV's) motion to dismiss for failure to serve notice of appeal to the DMV. Because the Court's opinion overlooks evidence in the record to support the reversal or remand to the Administrative Law Court, Desilet respectfully requests that the Court rehear this matter and alter its opinion to reverse or remand to the Administrative Law Court. In support of his petition, Appellant states as follows:

I. The Court failed to address the unprecedented effect of COVID-19 and the subsequent complications and adjustments.

Since approximately mid-March 2020, and well into 2021, the basic and fundamental operations of business and daily life were completely disrupted. Every business and governmental institution faced serious complications never before contemplated. Under normal circumstances Appellant's inadvertent clerical error could give rise to a substantive error,¹ but five months into the COVID-19 lockdown, the world was anything from normal. The Court's refusal to consider COVID-19, and other factors, has denied Appellant fundamental fairness of the opportunity to present his appeal.

Other than inadvertently making the clerical error, Appellant was forthright as to the error, and timely on all other filings.² Appellant timely filed the Notice of Appeal on August 17, 2020. R. p. 19. The Notice of Appeal was properly captioned and contained

¹ FN.2, Order of ALJ Lenski, December 18, 2020. R. p. 12.

² Affidavit of Kellie Reaves R. .p 78

proof of service to the following five (5) parties pursuant to Rule 203(6) SCARC: (1) The Clerk of the South Carolina Administrative Law Court (ALC); (2) The South Carolina Department of Office of Motor Vehicle Hearings (OMVH); (3) the Trooper; (4) The South Carolina Department of Public Safety (DPS); and (5) The South Carolina Department of Motor Vehicles (DMV).

The Appellant inadvertently made a clerical error and addressed DMV's notice to the address of the OMVH. R. p. 20. Still within the thirty (30) day deadline to serve notice pursuant to Rule 203, on August 28, 2020, the Notice of Assignment (Appeal) was issued by the ALC clearly indicating the parties in the caption and the review of the decision of the OMVH. R. p. 24.³

The record is void as to whether Appellant's Notice of Appeal was delivered to the OMVH or not. It is clear from the record that the United States Postal Service (USPS) did not "return to sender" for wrong address, nor forward to the DMV.⁴ Nevertheless, the record clearly shows the DMV, along with the DPS, were properly captioned as Respondents, and Respondent DMV acknowledges receipt of ALC's Notice on or about September 2, 2020, prior to the thirty (30) day notice deadline.

The record clearly shows less than two weeks after Office of Motor Vehicle Hearings (OMVH) issued its Order; Appellant timely filed the Notice of Appeal with the South Carolina Administrative Law Court (ALC). It is likely that if the USPS was operating as it had pre-pandemic, USPS would have either forwarded the letter to the

³ Respondent admits in its final brief to being served the ALC's Notice of Assignment on or about September 2, 2020, within the September 4, 2020 deadline from the August 5, 2020 OMVH decision R. p. 24.

⁴ Appellant was not only unaware of the clerical error as to DMV's, but would naturally assume the Appeal was properly filed when all parties were correctly listed in the caption and duly served the Assignment by the ALC.

DMV, or more likely, returned the letter to the sender (Appellant), and the clerical error concerning the incorrect address could have been promptly cured long before the September 4, 2020 deadline.

II. Respondent was not prejudiced by the Appellant's inadvertent clerical error.

Respondent cannot and does not assert that it never received any notice or suffered prejudice as a result, as its Notice of Motion and Motion to Dismiss was filed on or about September 26, 2020. R. pp. 25-26. Unlike *Conner v. City of Forest Acres*, where the Court found prejudice to a party due to the appellant's failure to list said party as respondent on the notice of appeal, here Respondent DMV was clearly listed on the Notice of Assignment and did in fact receive notice from the Court. *Conner v. City of Forest Acres*, 348 S.C. 545, 560 S.E.2d 606 (2002).

Furthermore, Respondent waited an additional twenty-four (24) days to mail its Motion to Dismiss on or about Saturday, September 26, 2020. R. pp. 25-26. In *Weatherford v. Price*, this Court stated, "that a mere clerical error in a Notice of Appeal" does not warrant the dismissal of the appeal, especially where counsel demonstrates no prejudice as a result. *Weatherford v. Price*, 340 S.C. 572, 578, 532 S.E.2nd 310, 313 (Ct. App. 2000)

Within a week of receiving the Respondent's Motion to Dismiss and learning of the inadvertent clerical error, Appellant filed his Response to Motion to Dismiss on Friday, October 2, 2020. R. p. 28. The following Monday, Appellant filed the corrected Notice of Appeal with Respondents corrected address on or about October 5, 2020. R. p. 34.

III. Conclusion

This Opinion fails to address the disruptions and unprecedented impact of COVID-19 regarding service to parties and unintentional failures in an otherwise normal and efficient system. Respondent was not prejudiced by the clerical error and did receive notification from the court within thirty (30) days of Appellant filing the Appeal. Failing to decide the issue on these additional issues and basing the decision solely on procedural grounds, Appellant will be denied the right to have his appeal heard on the merits.

Accordingly, the Appellant respectfully request that this Court grant the Petition, and upon further review, withdraw its opinion; address all evidence on the record; and reverse or remand to the Administrative Law Court.

s/Larry C. Marchant, Jr., SC Bar 102071
1720 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone: 803-771-1507
Facsimile: 803-771-9752
Email: larry@larrycmarchant.com
ATTORNEY FOR APPELLANT

December 21, 2022
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Docket No.: 20-ALJ-21-0213-AP

Andrew Davis Desilet,.....Appellant,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety, Respondents.

PROOF OF SERVICE

I certify that I served the PETITION FOR REHEARING (Unpublished Opinion No. 2022-UP-435) on the Respondents, and the Administrative Law Court, by electronically serving (via email) on December 21, 2022, a true and correct copy to:

The Honorable S. Phillip Lenski, Judge
SC Administrative Law Court
At: plenski@scalc.net

Jana E. Shealy, Clerk
SC Administrative Law Court
At: jshealy@scalc.net

SC Department of Public Safety
Teckla Henderson, Esq.
At: tecklahenderson@scdps.gov

SC Department of Motor Vehicles
Brandy Duncan, Esq.
At: Brandy.Duncan@scdmv.net
Curtis Hutchinson, Esq.
Curtis.Hutchinson@scdmv.net

Submitted by:
s/Larry C. Marchant, Jr., SC Bar 102071
1720 Main Street, Suite 301
Columbia, South Carolina 29201
Telephone: 803-771-1507
Email: larry@larrycmarchant.com
ATTORNEY FOR APPELLANT

Larry C. Marchant Jr.
Attorney & Counselor at Law
1720 Main Street Columbia, SC 29201
www.larrycmarchant.com

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December 21, 2022

The Honorable Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals

Via email: ctappfilings@sccourts.org

**RE: *Andrew Davis Desilet v. South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety***
Appellate Case No.: 2021-000007
Petition for Rehearing Unpublished Opinion No. 2022-UP-435

Dear Ms. Kitchings:

Attached please find scanned PDF of Appellant's Petition for Rehearing Unpublished Opinion No. 2022-UP-435 and scanned PDF of Certificate of Service. Please file these documents and return a "clocked" copy to me via email at larry@larrycmarchant.com.

Sincerely, I am

s/Larry C. Marchant, Jr.
Attorney for Appellant

Attachments as Stated

cc. The Honorable S. Phillip Lenski
Jana E. Shealy
Teckla Henderson, Esq.
Brandy Duncan, Esq.
Curtis Hutchinson, Esq.
Jeannine Moore, Esq.
Sierra Richie, Esq.