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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court
Appellate Case No.: 2021-000007

Appeal from The South Carolina
Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Unpublished Opinion No. 2022-UP-435 (S.C. Ct. App. December 7, 2022)

Andrew Davis Desilet Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

s/Larry C. Marchant, Jr.
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INDEX

Certificate of Counsel..... 3

Questions Presented..... 3

Statement of Case..... 3

Statement of Facts..... 4

Argument..... 5

 The Court of Appeals erred in not addressing the unprecedented effect
 of COVID-19 and the subsequent complications and adjustments to
 the basic and fundamental operations of business, government,
 and individuals..... 5

 Respondent was not prejudiced by the Appellant’s inadvertent clerical error..... 7

Conclusion..... 8

Pursuant to Rule 242, SCACR, Petitioner Andrew Davis Desilet respectfully files this Petition for a Writ of Certiorari to review the Court of Appeal’s decision in *Andrew Davis Desilet v. South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety*, 2022-UP-435 (S.C. Ct App. filed December 7, 2022).

CERTIFICATE OF COUNSEL

Counsel certifies that the petition for rehearing was made and denied by the Court of Appeals on January 12, 2023.

QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals err in not addressing the unprecedented effect of COVID-19 and the subsequent complications and adjustments to the basic and fundamental operations of business, government, and individuals?
- II. Was the Respondent prejudiced by the Appellant’s inadvertent clerical error?

STATEMENT OF THE CASE

Andrew Davis Desilet refused to submit to a breath, blood, or urine test, and was charged with a violation of S.C. Code Ann. §56-5-2950 (2018) and requested a contested case hearing before the State of South Carolina Office of Motor Vehicle Hearings (hereinafter “OMVH”). (R. p. 16). A hearing concerning the appeal of his license suspension was held on August 4, 2020, and a Final Order and Decision (hereinafter “Decision”) was issued on August 5, 2020, by OMVH Hearing Officer Samuel L. Johnson upholding the suspension of Appellant’s driver’s license. (R. pp. 1-11).

On August 17, 2020, Desilet filed and served his Notice of Appeal of the OMVH decision to the South Carolina Administrative Law Court (hereinafter “Notice”), South Carolina Department of Motor Vehicles (hereinafter “DMV”), South Carolina Department of Public Safety (hereinafter “DPS”) and the State Trooper Brazell. (R. pp. 18-23). Approximately eleven (11) days later, on August 28, 2020, the South Carolina Administrative Law Court served Notice of all parties with NOTICE OF ASSIGNMENT (Appeal), and assigning Docket # 20-ALJ-21-0213-AP. (R. p. 24).

On September 26, 2020, almost a month after the Court issued its Notice of Assignment of Appeal, Respondent DMV filed a motion to dismiss appeal for failure of Appellant to properly serve Respondent DMV under the rules. (R. pp. 25-26). On October 2, 2020, Appellant’s Response was promptly filed. (R. pp. 29-33), and three (3) days later, on October 5, 2020, Appellant filed notice as to DMV’s corrected service address. (R. pp. 34-38). On October 5, 2020, DMV filed amended motion to dismiss to correct a typo in its original motion. (R. pp. 39-40).

On December 18, 2020, Judge S. Phillip Lenski held a hearing and filed his Order granting the DMV’s Motion to Dismiss. (R. pp. 12-15). On December 7, 2022, the Court of Appeals issued its unpublished opinion, affirming the judgement of the Administrative Law Court.

STATEMENT OF THE FACTS

Less than two weeks after the OMHV issued its Order upholding the suspension of Andrew Desilet’s license (R. pp. 1-11), Desilet filed his Notice of Appeal with the South Carolina Administrative Law Court (herein after “ALC”) on August 17, 2020. (R. p. 18). Unknowingly at the time, and despite clearly listing “South Carolina Department of Motor Vehicles” in the caption and correctly naming on the notice to be mailed, the paralegal for Appellant’s counsel

inadvertently addressed the notice for the Respondent DMV to the address of the OMHV.¹ (R. pp. 21-22). Eleven (11) days later, on August 28, 2020, the Clerk for the ALC, Jana E. Shealy, filed and served all parties, the Notice of Assignment for Appeal, clearly listing the South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety as Respondents². (R. p. 24).

Although the Respondent DMV was provided notice by the Court almost a month earlier, Respondent DMV filed and served a Notice of Motion and Motion to Dismiss Appellant's Appeal on September 26, 2020, arguing that the DMV had not been properly served by Desilet pursuant to SCLAC Rule 33. (R. p. 25). Administrative Law Judge Lenski issued the Order underlying this Appeal on December 18, 2020. (R. 12-15).

ARGUMENT

I. The Court of Appeals erred in not addressing the unprecedented effect of COVID-19 and the subsequent complications and adjustments to the basic and fundamental operations of business, government, and individuals.

The Court's opinion to focus solely on Desilet's concession for failure to serve the DMV, without also considering the impact of COVID-19, overlooks substantial, and hopefully, once in a lifetime mitigating circumstances. Under normal circumstances Appellant's inadvertent clerical error could give rise to a substantive error,³ but five (5) 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.

¹ The correct address Respondent DMV is P.O. Box 1498, Blythewood, SC 29016-0020; the Notice for DMV was inadvertently mailed to the address OMVH which is: 1205 Pendleton St., Suite 325, Columbia, SC 29201. Appellant notes that USPS never returned the incorrectly addressed Notice.

² Appellant notes that this Notice was issued to Respondents, therefore giving DMV notice well within thirty (30) days.

³ FN.2, Order of ALJ Lenski, December 18, 2020. R. p. 12.

Appellant Desilet was forthright as to the error, and timely on all other filings.⁴ Appellant timely filed the Notice of Appeal on August 17, 2020. (R. p. 19). The Notice of Appeal was properly captioned and contained 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).

Appellant Desilet 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).⁵ Appellant Desilet never received any returned mail or notice that the actual Notice itself was addressed incorrectly, and thus was never given an opportunity to cure this clerical error.

Coincidentally, the DMV also made a similar clerical error as to Notice of Motion to Dismiss by addressing the envelope to counsel of Appellant Desilet to 1701 Main Street Columbia, South Carolina, which is the address of the Richland County Courthouse. Appellant Desilet counsel's address is 1720 Main Street. (R. p. 30).

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.⁶ Nevertheless, the record clearly shows the

⁴ Affidavit of Kellie Reaves R. p 78

⁵ 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.

⁶ 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, 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.⁷

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). (R. pp. 18-20). It is likely that if the USPS was operating as normal pre-pandemic, USPS would have likely either forwarded the letter to the DMV⁸, or 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 as evidenced in the timeliness of Appellant's prior filings.

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

In *Weatherford v. Price*, the 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.2d 310, 313 (Ct.App.2000). In *Mason v. Mason*, an appeal was found to be proper because a party to the appeal "at least had notice he was a party to the appeal within the time required to file an appeal from the [special referee's] decision." *Mason v. Mason*, 412 S.C. 28, 770 S.E.2d 405 (Ct.App.2015). 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

⁷ Respondent admits to receiving ALC's *Notice of Assignment* (Final Brief p. 13).

⁸ DMV and DPS share the same campus in Blythewood

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 after receiving notice from the Court of Appeals to file its Motion to Dismiss, on or about Saturday, September 26, 2020. (R. pp. 25-26). 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).

CONCLUSION

Because the Court of Appeals' opinion fails to consider the unprecedented impact of COVID-19 regarding service to parties and unintentional failures in an otherwise normal and efficient system, *certiorari* is necessary to correct and adequately address.

Respondent DMV was not prejudiced by the clerical error and did in fact receive notice of the appeal from the court within thirty (30) days. Just months following the mid-March of 2020 shutdown, basic and fundamental operations of business and daily life was completely disrupted. Every essential business and service provider across the United States, ranging from restaurants to courts, faced complications and adjustments that prior to the year 2020 had never been contemplated. The Court of Appeals' refusal to address these, and other issues raised, and basing its decision solely on procedural grounds, has denied the right of Appellant Desilet to have his appeal heard on the merits.

Petitioner therefore requests that this Court grant this Petition and issue a Writ of Certiorari to review the Court of Appeals' decision in this case, order briefing, permit oral argument, and reverse the Court of Appeals' decision.

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February 2, 2023
Columbia, South Carolina

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Andrew Davis Desilet Petitioner,

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South Carolina Department of Public Safety Respondents.

PROOF OF SERVICE

I certify that I served the **PETITION FOR WRIT OF CERTIORARI** (Unpublished Opinion No. 2022-UP-435) on the Respondents, and the Administrative Law Court, by electronically serving (via email) on February 2, 2023, 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.
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SC Court of Appeals

February 2, 2023

The Honorable Patricia Howard, Clerk
The South Carolina Supreme Court

VIA EMAIL: suptcfilings@sccourts.org

RE: *Andrew Davis Desilet v. South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety*
Unpublished Opinion No. 2022-UP-435 (S.C. Ct. App. December 7, 2022)

Dear Ms. Howard:

Attached please find scanned PDF of Petition for Writ of Certiorari, Certificate of Service, and Appendix. Please file these documents and return a “clocked” copy to me via email at larry@larrycmarchant.com. I will deliver the \$100 filing fee to you.

Sincerely, I am

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

Attachments as stated

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