

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. Supreme Court

Edward W. Miller, Circuit Court Judge

S.C. Ct. App. Orders dated June 29, 2012 and Feb. 25, 2013

Michael Jarrard, Respondent,

v.

Federal Express Corporation, Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The respondent proposes the following as re-statements of the questions presented:

- I. Did the Court of Appeals Correctly Hold That the Error in FedEx's Notice of Appeal Was Not a "Clerical" Error?
- II. Is it Necessary for this Court to Grant Certiorari and Explain Which Errors Are Fatal in a Notice of Appeal and Which Errors Are Not?
- III. Assuming That the Order at Issue Involves a Novel Application of Law, Does this Novelty Counsel in Favor of Granting Certiorari?

COUNTER-STATEMENT OF THE CASE

Michael Jarrard suffered a brain injury while working for Federal Express. In 2006, a hearing commissioner found that Mr. Jarrard was permanently and totally disabled and awarded him benefits. See (App.p.31, lines 3-11) (describing this part of the case's history).

This case is about two disputes that arose after the award. First, Mr. Jarrard asked the commission to compensate his wife for the home health care she provides as his primary caregiver. Second, he asked for part of his benefits in a lump sum.

FedEx opposed both requests, and the requests were processed separately. They were heard by different hearing commissioners, different appellate panels, and they were heard at different times. These requests were initiated several months apart. Mr. Jarrard filed the request about his wife's attendant care in March of 2009. He did not request a lump sum until six months later, in September of 2009. See (App.p.118) (referencing these dates).

The commission granted both requests, and FedEx appealed both orders. The attendant care order was issued in July of 2010 and appealed in August. The lump-sum order was issued in January of 2011 and appealed in February. Because Mr. Jarrard's injury

occurred prior to July 1, 2007, both appeals went to the circuit court. See *Pee Dee Reg'l Transp. v. South Carolina Second Injury Fund*, 375 S.C. 60, 62, 650 S.E.2d 464, 465 (2007) (explaining the 2007 changes to workers' compensation appeals).

The circuit court assigned different case numbers to the appeals, but it heard them both in a single hearing that it conducted in July of 2011. In November of 2011, the circuit court issued separate orders that affirmed each decision. See (App.p.1) (the attendant care order) and (App.p.9) (the lump sum order).

FedEx filed a timely notice of appeal with the Court of Appeals. See (App.p.48). This notice was written in the singular—it described “the” order and the date that FedEx received “this” order. The notice listed only the case number for the lump sum order, and only the lump sum order was attached.

Five months later, in May of 2012, FedEx filed a motion requesting leave to amend the notice of appeal. FedEx said that it had inadvertently failed to attach the attendant care order to the notice. It called this a “clerical” error. (App.pp.56-58).

Mr. Jarrard opposed the motion to amend. He conceded that he was not prejudiced, but he argued that changing the notice to refer to two orders instead of one was not fixing a “clerical” error. He said that the notice had no internal inconsistency or deficiency, and he claimed that this made the case different from prior cases where a notice was sufficient to perfect an appeal despite having a technical deficiency. See (App.pp.60-67).

On June 29, 2012, the Court of Appeals issued an order denying the motion to amend. The court reasoned that there was no clerical error in the notice and that FedEx had failed to perfect an appeal of the attendant care order. See (App.p.99).

FedEx filed a petition for rehearing and requested rehearing *en banc*. (App.p.101). Mr. Jarrard opposed rehearing, see (App.p.109), and a three judge panel conducted oral argument in February of 2013.

On February 25, 2013, the panel issued an order adhering to its original conclusion that the notice did not contain a clerical error. After concluding that the notice could not be altered as FedEx requested, the panel reviewed the notice and held that it was not sufficient to give the court jurisdiction over the attendant care order, even though the two orders arose out of the same general “case.” (App.pp.118-121).

FedEx again sought rehearing and requested rehearing *en banc*. (App.p.123). The Court of Appeals denied rehearing in an order filed July 16, 2013. (App.p.130).

ARGUMENT

The critical issue in this case is whether the Court of Appeals erred in denying FedEx’s motion to amend its notice of appeal. Because the Court of Appeals decided this issue correctly, Mr. Jarrard respectfully submits that this Court should deny the petition.

I. The Court of Appeals Correctly Held That FedEx’s Notice Did Not Contain a “Clerical” Error.

The error in FedEx’s notice of appeal was not clerical. An error is not a clerical error just because it is inadvertent and does not cause prejudice. The test is whether the document has an inconsistency and whether the change will alter the document’s scope.

That test is not satisfied here. Instead, FedEx wants to take an unambiguous document that says one thing and change it to say something different. The Court of Appeals analyzed this question correctly, and the decision the court reached was the right decision.

- a. The test for a clerical error is whether the document has an obvious inconsistency and whether the proposed change will alter the document's scope.

Most of what South Carolina's courts have written about clerical errors has focused on errors in court orders. See Rule 60(a), SCRCP (court can always correct clerical errors).

A clerical error is "a mistake or omission by a clerk, counsel, judge or printer, which is not the result of exercise of judicial function." *Ex parte Strom*, 343 S.C. 257, 264, 539 S.E.2d 699, 702 (2000) (quoting *Dion v. Ravenel, Eiserhardt Assocs.*, 316 S.C. 226, 230, 449 S.E.2d 251, 253 (Ct. App. 1994)). The Court of Appeals has said that if a modification "changes the scope of the judgment," it is not a clerical change. See *Brown v. Brown*, 392 S.C. 615, 623, 709 S.E.2d 679, 683 (Ct. App. 2011). Clerical errors include "misspelling[s], misplaced decimal[s], or [] miscalculation[s]." *Id.* at 622, 709 S.E.2d at 683. They do not include changes that add new terms to a document. *Id.* at 623, 709 S.E.2d at 683.

There have been several previous cases involving errors in a notice of appeal. Deciding whether those errors can be corrected has relied on whether the errors are clerical. As long as the notice and accompanying documents logically imply an appeal of a certain scope, a technical deficiency in the notice has not destroyed the appeal. See *Pittman v. Stevens*, 364 S.C. 337, 613 S.E.2d 378 (2005) (notice was adequate to inform the respondent of the issue presented); *State v. Scott*, 351 S.C. 584, 571 S.E.2d 700 (2002) (notice was accurate but served on the wrong lower court); *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000) (notice did not directly refer to the appealed order, but the order was attached); and *Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563 (1899) (caption incorrectly read "Moody as administrator v. Dickinson" instead of "Moody and others v. Dickinson").

But when the notice was *not* ambiguous, courts have not allowed a change, even though the error in the notice might have been inadvertent. This occurred in *Conner v. City of Forest Acres*, when the court denied the appellant's request to name an additional respondent after the deadline. See 348 S.C. 454, 560 S.E.2d 606 (2002).

This is a rule of reason. If the notice of appeal and its accompanying materials reasonably imply an appeal of a particular scope, courts have freely allowed amendments that conform the notice to that scope. But if the proposed changes would alter the scope of the appeal, those changes have not been allowed. Such changes are not "clerical" changes. They take the appeal in a different direction.

FedEx has said that the test for whether an appellant can amend the notice of appeal is whether the opposing party will be prejudiced. This Court should reject that suggestion.

If lack of prejudice was the test, all of the previous cases on this subject would be written differently. They would not waste time examining whether the documents filed with the court logically implied an appeal of a particular scope; instead, each case would ask and answer two questions: did the appellant serve all of the respondents with *something* that named them as respondents, and have any of the respondents filed a brief. If both answers are "no," a rule based on prejudice would freely allow all amendments.

That is not the analysis past cases have followed. Yes, all of the cases that deal with deficient notices of appeal mention prejudice at some point, but FedEx is making prejudice the beginning and the end of the test. That view is not sound. Both this Court and the Court of Appeals have recited—correctly—that non-prejudicial errors will not destroy an appeal. But these same cases articulate that this is only as long as those errors are "clerical."

- b. FedEx's notice is unambiguous and did not logically implicate two orders instead of one.

FedEx's notice of appeal does not contain a clerical error. See (App.pp.48-55). If one reads the document to mean what it says, it says that FedEx is appealing one order, issued on a specific day, bearing a specific case number. An order fitting that description was attached to the notice, and as the Court of Appeals found, this is different from every one of the previous cases where an appellate court has allowed a party to amend a notice of appeal. See (App.pp.119-120). Nothing in FedEx's notice indicates that it contains an error.

It would be different if the notice had listed the case number for the lump sum order but the attendant care order had been attached. *That* filing would have an obvious inconsistency and would fairly implicate both orders. That case would be fairly comparable to *Weatherford v. Price*, where the notice did not directly refer to the appealed order, but the order was attached. 340 S.C. at 572, 532 S.E.2d at 310. It would also be fairly comparable to *Charleston Lumber Co. v. Miller Housing Corp.*, where the single notice that covered several related cases did not list one of the case numbers, but the order was nevertheless attached. 318 S.C. 471, 477-78, 458 S.E.2d 431, 435-36 (Ct. App. 1995). In each of those circumstances, the documents filed with the court gave some clue of an error and implied an appeal of a particular scope. Here, there are no such clues. FedEx's notice is clear.

- c. FedEx is asking the court to overlook an unambiguous document and assume that opposing litigants are clairvoyant.

FedEx has repeatedly claimed that Mr. Jarrard should have known it was going to appeal the attendant care order.

This is really an argument that Mr. Jarrard should be a psychic. These were two separate requests that Mr. Jarrard made. FedEx fought them separately in front of the commission, and FedEx appealed them separately to circuit court. For whatever reason—either because the appeals were filed months apart or because FedEx captioned them with different case numbers—the requests acquired separate identifying information at the start of the appeal. The disputes were discussed separately at the circuit court hearing, see (App.pp.17-46), and the circuit court addressed them in separate orders.

Mr. Jarrard is *not* a psychic. Nowhere in FedEx's petition is there a cogent explanation of why anyone—a court, an opposing litigant, or a reasonable observer—would read FedEx's notice of appeal and surmise that it was intended to cover two orders and not one. FedEx has decided to continue fighting only one of these requests and not the other, and that is FedEx's prerogative. But these are separate appeals, with separate identifying information. Just as any pro forma filing in one of them would not naturally implicate the other, so too does the notice of appeal not fairly implicate both orders.

The circumstances would be meaningfully different if the issues in these appeals had some relation to each other. *That* case might be similar to other cases where it would have been nonsensical for a party to abandon one part of the case, but not the rest. See *Charleston Lumber Co.*, 318 S.C. at 477-78, 458 S.E.2d at 435-36 (abandoning one of the related cases, but not the others, would have been fatal to the appeal).

But the issues in the attendant care order have no effect on the lump sum order, and vice versa. There is nothing implausible about FedEx appealing one of these orders, but not the other. As the Court of Appeals correctly found, that is what FedEx's notice did.

II. This Court Does Not Need to Issue a Decision Explaining Which Errors Are Fatal in a Notice of Appeal and Which Errors Are Not.

FedEx's petition suggests that this Court should grant certiorari because the question of which errors are fatal in a notice of appeal is important to future litigants and to the clerk's office at the Court of Appeals.

There does not appear to be any evidence that courts have struggled to distinguish between clerical errors and substantive errors. There are several published decisions dealing with defective notices of appeal, and nobody has yet suggested that there is any conflict in these decisions. As long as the decision the Court of Appeals reached in the present case is faithful to the rationale of these previous cases (Mr. Jarrard obviously believes it is), there does not appear to be any uncertainty to settle or clarity to provide.

This appears to be true in other contexts. Whether the document is a notice of appeal or a court order, courts do not seem to be experiencing difficulty in distinguishing clerical errors from substantive ones. In *Ex Parte Strom*, this Court held that the power to fix clerical errors does not extend to retroactively relieving an attorney. 343 S.C. at 264, 539 S.E.2d at 702. In *Brown v. Brown*, the Court of Appeals held that re-classifying a party's share in the marital home was not a "clerical" change, even though the family court judge called it a "clarification." 392 S.C. at 621-23, 709 S.E.2d at 683-84. *Cullen v. McNeal* involved a contract that repeatedly referred to an individual as a "developer," but omitted this individual from the contract's definition of "developer." In light of the repeated references to this person as a developer, the Court of Appeals held that his omission from part of the contract was a clerical mistake. 390 S.C. 470, 482-84, 702 S.E.2d 378, 384-85 (Ct. App. 2010).

Again, the most reasonable reading of the relevant cases is that when the notice of appeal and its accompanying documents logically imply an appeal of a certain scope, any amendments that conform the notice to that scope are absolutely permissible. All of these cases leave the reasonable reader with that impression. If, for example, there is only one case pending between two people, it is probably not fatal if the notice of appeal does nothing other than list their names. Under any reasonable construction, that filing provides one party with notice that the other party is appealing the case.

But if there are two cases between the parties, and only one of the cases is listed in the notice of appeal, that is materially different. These principles appear to be straightforward. The petition does not offer any concrete need to clarify them.

III. Assuming That the Order in Question Involves a Novel Issue, this Novelty Does Not Provide a Reason to Grant Certiorari.

FedEx suggests that certiorari is appropriate because the attendant care award involves a novel application of law.

This question was not presented to the Court of Appeals and is not appropriate for the certiorari petition. At no point in the motion to amend the notice of appeal, (App.pp.56-58), the first petition for rehearing, (App.pp.101-106), or the second petition for rehearing, see (App.pp.123-127), did FedEx claim that the Court of Appeals could overlook a defect in the notice of appeal because the attendant care order involves a novel issue.

The petition also provides no authority to support this argument. As far as Mr. Jarrard can discover, no authority supports the view that a party may use certiorari to review the merits of an issue that the party did not perfect for a direct appeal.

CONCLUSION

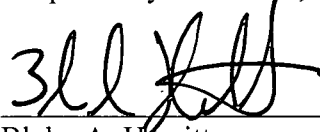
The rules require an appellant to include several pieces of identifying information in the notice of appeal. The rules also require the appellant to attach the orders that are being appealed to the notice. No doubt part—if not all—of the reason these requirements exist is so that an appellant has multiple opportunities to describe the matters that he or she wishes to bring into the appellate court's jurisdiction.

FedEx says that this case is not about jurisdiction, but that is obviously not true. If FedEx's notice of appeal was sufficient to confer the court with jurisdiction over the attendant care order, there is no need—none—to amend the notice of appeal.

FedEx will say that this is a harsh result, but it is not. The decision below does nothing more than hold FedEx to the unambiguous document that it filed. The conclusion that the Court of Appeals reached is the correct conclusion; there is no clerical error, and the notice of appeal did not cover both orders. This Court should deny the petition.

September 12, 2013

Respectfully submitted,



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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioner with a copy of the Respondent's *Return to Petition Writ of Certiorari* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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