RECEIVED
Dec 04 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2024-001652

South Carolina Department of Consumer Affairs ..... Respondent,

v.

Lavisha Green ..... Appellant.

DEPARTMENT'S REPLY TO MS. GREEN'S RETURN TO DEPARTMENT'S MOTION TO DISMISS

The South Carolina Department of Consumer Affairs ("Department") respectfully submits this reply to Lavisha Green's ("Ms. Green") Return to the Department's Motion to Dismiss, which counsel filed on her behalf on November 25, 2024. The Department, through its counsel, filed a Motion to Dismiss on November 13, 2024, based on Ms. Green's failure to timely serve and file her appeal as required by S.C. Code Ann. § 1-23-610 (Supp. 2024) and Rule 203(b)(6), SCACR, and her failure to file a motion for reconsideration with the Administrative Law Court ("ALC") as required by SCALC Rule 29(D)(4). For the reasons stated in the Motion to Dismiss and in this Reply, this Court should dismiss Ms. Green's appeal.

I. Based on the applicable court rules and established case law, Ms. Green's Notice of Appeal was not timely filed.

Ms. Green argues Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC, 422 S.C. 211, 810 S.E.2d 856 (2018) does not support the Department's argument. App.'s Return to Mot. to Dismiss p. 2. However, she misconstrues the point the Department was making. In Wells Fargo, the Court addressed the novel issue of whether receipt of electronic correspondence is sufficient to trigger the time to appeal under Rule 203, SCACR. Id. at 217, 810 S.E.2d at 859. In that case, the Court held that "an email, if sent from the court, an attorney of record, or a party, triggers the time to serve a notice of appeal." Id. at 217, 810 S.E.2d at 859. The Court then went beyond Rule 203(b)(1), SCACR, to apply its holding to timeliness of a notice of appeal from an ALC decision under Rule 203(b)(6), SCACR.

The Court discussed the case of White v. S.C. Dep't of Health and Env. Ctrl, 392 S.C. 247, 708 S.E.2d 812 (Ct. App. 2011), acknowledging the distinction between Rule 203(b)(1) and 203(b)(6), SCACR, and concluded, "when determining whether the service of a notice of appeal from the ALC is timely, the court is concerned with the date the party actually ***receives the decision***, not the date the party receives written notice that an order or judgment has been entered." Id. (emphasis added). The Court also agreed with the White decision in that Rule 203(b)(1) and Rule 203(b)(6) require the receipt of different things to trigger the time to appeal but explained that "does not necessarily mean the manner in which a party receives those things must differ in order to trigger the time to appeal." 422 S.C. at 218–219, 810 S.E.2d at 860. The Court ultimately overruled the Court of Appeals decision in White "to the extent it . . . interprets 'receipt of the decision' to require receipt of the decision by mail or hand delivery in order to trigger the time to appeal under Rule 203(b)(6), SCACR." Id. at 219, 810 S.E.2d at 860. Thus, since 2018, case law

has established that receipt of the ALC decision by email, if sent from the court, an attorney of record, or a party, triggers the time to serve a notice of appeal under Rule 203(b)(6), SCACR.

Ms. Green also maintains the Lemmons v. Maced. Water Works, Inc., 431 S.C. 186, 847 S.E.2d 471 (Ct. App. 2020) case rejected the same argument the Department makes in its motion. App.'s Return to Mot. to Dismiss p. 3. This is incorrect. The Lemmons court acknowledged that as of 2020, "the question of whether the email's timestamp can be presumed to be the date of a party's receipt of the notice has not yet been addressed by our appellate courts." 431 S.C. at 194, 847 S.E.2d. at 476. As such, the Lemmons court "look[ed] to the Record on Appeal to determine the date of receipt of the circuit court's e-mail notice according to the standards of section 26-6-150(B)" of the Uniform Electronic Transactions Act. Id. Because there was no record establishing either the date the court's email notice entered counsel's email server or whether email notice was in a form capable of being processed by counsel's server, the court rejected the Utility's argument that the customer did not timely invoke the Court of Appeals' appellate jurisdiction. Id. The facts and circumstances of the Lemmons case are materially different from those of Ms. Green's but the same logic and analysis applies.

When this Court looks at the exhibits provided by the parties, it is clear Ms. Green received the ALC decision via email on August 2, 2024, when the court emailed it to the email address she had provided on the Request for Contested Case Hearing Form. Furthermore, the ALC mailed a copy of the final order via the United States Postal Service. Resp.'s Mot. to Dismiss Ex. B, D. Though Ms. Green swears she did not receive the August 2 email until August 27 and she never received a hard copy of the order that was mailed to her by the court, she has not provided any cogent explanation—technical or otherwise—how two reasonably reliable sources of transmission failed simultaneously. No evidence has been provided that her email account was inaccessible or

inoperable for the period between August 2–27. She also did not provide confirmation in the form of screenshots or other records of her email inbox to confirm she actually received the email from the Administrative Law Court on August 27, 2024, as opposed to a date and time closer to August 2, 2024, 11:04 AM. App.'s Return to Mot. to Dismiss Ex. D. She also did not provide any indication that the attached order was inaccessible or unreadable for some period of time prior to August 27.

There is nothing in the record establishing any reason that would explain a complete failure of two reasonably reliable methods of communication. Therefore, with the information before this Court now, as it envisioned in Lemmons, there is more than enough to establish that Ms. Green received the ALC's final order on August 2 and simply did not see it until August 27, 2024. Unfortunately, that is not a sufficient excuse to relieve her of the duty to adhere to well-established court rules. Thus, the Department is not asking this Court to fundamentally alter Rule 203(b)(6), SCACR, as Ms. Green indicates. App.'s Return to Mot. to Dismiss p. 4–5. In fact, the Department is asking this Court to apply Rule 203(b)(6), SCACR, as well as case law established since 2018 and 2020 and grant the Department's Motion to Dismiss.

II. The requirement to file a motion for reconsideration before filing a Notice of Appeal with this Court has been in effect since 2019.

Ms. Green states the "new rule" requiring her to file a motion for reconsideration at the ALC before filing her Notice of Appeal with this Court went into effect on April 8, 2024. App.'s Return to Mot. to Dismiss p. 5. The requirement to file a motion for reconsideration, however, is not new. In 2016, SCALC Rule 29(D)(4) included a sentence providing, "The filing of a motion for reconsideration is not a prerequisite to filing a notice of appeal from a final decision of an administrative law judge."[1] This sentence, however, was removed when the ALC published its

[1] https://www.scalc.net/Rules%20documents/officialrules2016.pdf, accessed on Dec. 3, 2024.

revised rules in 2019.[2] The ALC also added a sentence to the notes in 2019 explaining, "In accordance with applicable case law on issue preservation, the last sentence of subsection (D), which stated a motion for reconsideration is not a prerequisite to filing a notice of appeal, has been deleted." SCALC Rule 29, 2019 Revised Notes, accessed on Dec. 3, 2024. This note has appeared in all subsequent revisions to the ALC rules.

In April 2024, the ALC published the official rules and SCALC Rule 29(D)(4) now includes the following language: "…prior to filing a notice of appeal from the decision, a party must file a motion for reconsideration." SCALC Rule 29(D)(4).[3] On the ALC's official website where the rules are found, the ALC even explains that notable changes this year include "amending Rule 29 to ***clarify*** that in contested cases, a motion for reconsideration is required prior to filing a notice of appeal."[4] (emphasis added). Thus, although Ms. Green contends the rule changed in 2024, in fact, the rule changed in 2019, well before she filed her Request for a Contested Case Hearing in this matter on November 14, 2023. The clarifying language was added to the rule in April 2024, before the ALC issued its decision. As such, this Court should grant the Department's Motion to Dismiss because Ms. Green failed to file a motion for reconsideration as required by the ALC rules.

III. The ALC rule change is not inconsistent with the South Carolina Appellate Court Rules, the Rules of Civil Procedure, or the statutes governing the ALC.

Ms. Green asserts the ALC rule change is inconsistent with the Appellate Court Rules, Rules of Civil Procedure, and the statutes governing the ALC. App.'s Return to Mot. to Dismiss p. 7. This is incorrect. In fact, as demonstrated above, the requirement to file a motion for

[2] https://www.scalc.net/Rules%20documents/officialrules2019.pdf, accessed on Dec. 3, 2024.
[3] https://www.scalc.net/Rules%20documents/24%20Official%20ALC%20Rules.pdf, accessed on Dec. 3, 2024.
[4] https://www.scalc.net/rules.aspx, accessed on Dec. 3, 2024.

reconsideration before appealing an ALC decision apparently happened in or around 2019 as a result of case law. The Department discussed possible cases leading to the change in its Motion to Dismiss. Resp.'s Mot. to Dismiss p. 6. S.C. Dep't of Motor Vehicles v. Dover, 423 S.C. 153, 160 n3, 813 S.E.2d 532, 535 n3 (Ct. App. 2018), (citing Risher v. S.C. Dep't of Health & Envtl. Control, 293 S.C. 198, 208, 712 S.E.2d 428, 422 (2011)) held that the appellant's failure to file a motion for reconsideration or a motion to alter or amend pursuant to SCALC Rules 29 or 68 (or Rules 59(e) or 60, SCRCP) renders issues unpreserved for appellate review)). Thus, Ms. Green's assertion that the ALC Rule 29 is inconsistent with case law or rules of procedure is not accurate. As such, the Department's motion to dismiss should be granted because Ms. Green did not preserve any issues for the Court of Appeals to review.

IV. This Court should not hold this appeal in abeyance.

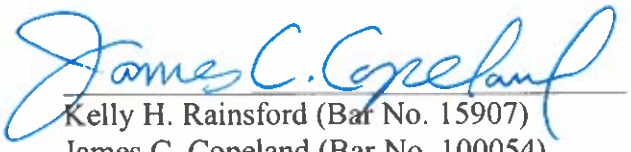
Ms. Green has requested this court to hold this appeal in abeyance while she goes back to the ALC for a second chance because she made every effort to notify the ALC that she intended to appeal its decision. App.'s Return to Mot. to Dismiss p. 8–9. However, this Court should not condone any litigant failing to follow the same rules that all other pro se litigants and their attorneys must follow. Courts should and do allow pro se litigants a degree of lenience in matters such as pleadings and specificity for grounds of objections that would not be allowed for parties represented by counsel. See Elijah v. Dunbar, 66 F. 4th 454, 460 (4th Cir. 2023). However, this lenience does not extend to the substantive or procedural requirements of the law. A litigant who knowingly elects to represent himself assumes full responsibility for complying with the substantive and procedural requirements of the law. State v. Burton, 356 S.C. 259, 265 n. 5, 589 S.E.2d 6, 9 n.5 (2003); State v. Policao, 402 S.C. 547, 558, 741 S.E.2d 774, 779–80 (Ct. App. 2013); State v. Bryant, 383 S.C. 410, 418, 680 S.E.2d 11, 15 (Ct. App. 2009).

Conclusion

For the reasons discussed in the Department's motion and this reply, this Court should grant the Department's motion to dismiss this appeal. Further, this Court should grant the Department's motion to dismiss because:

1. This Court lacks jurisdiction to hear this appeal. The Notice of Appeal was not timely filed and served upon the ALC or the Department. Ms. Green has not put forth any evidence to rebut the presumption that she received the email with the Final Order on August 2, 2024, when the court emailed it to the email address she had provided to the court and used throughout the case.
2. Even if this Court has jurisdiction to hear the appeal, the motion to dismiss should be granted because Ms. Green did not file the mandatory motion for reconsideration that is a prerequisite for an appeal and, therefore, has failed to preserve any issues for review by this Court.

Respectfully Submitted,



Kelly H. Rainsford (Bar No. 15907)
James C. Copeland (Bar No. 100054)
Zachary A. Passmore (Bar No. 100203)
S.C. Department of Consumer Affairs
P.O. Box 5757 (zip: 29250-5757)
293 Greystone Blvd., Suite 400
Columbia, SC 29210
(803) 734-0375
krainsford@scconsumer.gov
jcopeland@scconsumer.gov
zpassmore@scconsumer.gov

Attorneys for Respondent

December 4, 2024

RECEIVED
Dec 04 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2024-001652

South Carolina Department of Consumer Affairs ..... Respondent,

v.

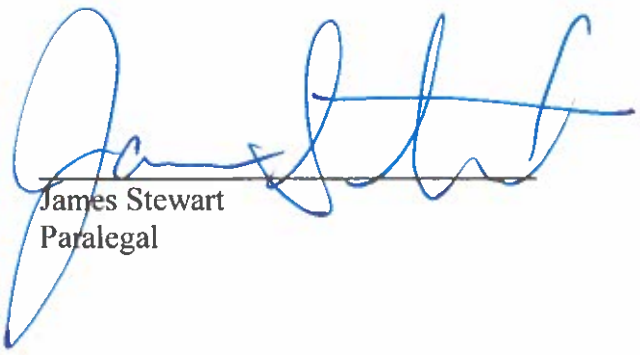
Lavisha Green ..... Appellant.

PROOF OF SERVICE

I, the undersigned employee of the South Carolina Department of Consumer Affairs, hereby certify that the Reply to Ms. Green's Return to Department's Motion to Dismiss in the above-referenced matter was served on the following counsel of record via email at the addresses listed below:

Adam Sinclair Ruffin, Esquire
adam@ruffinappeals.com

Attorney for Appellant



James Stewart
Paralegal

December 04, 2024
Columbia, South Carolina

South Carolina
DEPARTMENT OF CONSUMER AFFAIRS
293 GREYSTONE BOULEVARD, STE. 400
P. O. BOX 5757
COLUMBIA, SC 29250-5757

Carri Grube Lybarker
Administrator/
Consumer Advocate

PROTECTING CONSUMERS SINCE 1975

December 04, 2024

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: South Carolina Department of Consumer Affairs v. Lavisha Green
Appellate Case No. 2024-001652

Dear Ms. Kitchings:

Enclosed herewith for filing please find the Department's Reply to Ms. Green's Return to Department's Motion to Dismiss and Proof of Service in the above-referenced matter. Pursuant to Rule 240(d), SCACR, it is the Department's understanding that a filing fee is not required.

If you have any questions or require additional copies, please do not hesitate to call me at (803) 734-0375.

Respectfully,

James C. Copeland

James C. Copeland
Chief Enforcement Attorney

CC: Adam S. Ruffin, Esquire (via email to adam@ruffinappeals.com)