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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Debra R. McCaslin, Circuit Judge

Case No. 2022-001655

James Marshall Shoemaker, III.....Appellant,

v.

Lesley R. Moore, Esq. as Personal Representative and Trustee, Edward Sloan Shoemaker and
Jonathan Evans Shoemaker.....Respondents.

PETITION FOR REHEARING

s/ William R. McKibbon III
(Bar No. 68454)
601 E. McBee Ave, Ste. 104
Greenville, SC 29601
864.235.0071, 864.235.0072 (f)
will@legalcarolina.com
Attorney for Appellant

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellant moves this court for rehearing based on the following points the Appellant contends to have been overlooked or misapprehended by the Court.

A. HAD THE APPELLATE COURT FOUND THAT THE LOWER TRIBUNAL JUDGE COULD NOT HEAR THE CASE UNDER THE JUDICIAL CANONS AND RULES OF RECUSAL, REVERSAL AND REMAND WOULD HAVE BEEN REQUIRED, AND THE ISSUE UPON WHICH THE COURT DID RULE WOULD HAVE BEEN MOOT AND UNNECESSARY TO REACH.

This Court's opinion ruled upon only the single issue of Appellant's untimeliness of filing his notice of appeal and statement of issues on appeal, and therefore foreclosed any consideration of the remaining issues before the court, namely the issue of the lower court judge's conflict of interest and the necessity or propriety of his recusal.

Had the Court addressed this issue, it would have determined that the issue of Appellant's timeliness and content of his Notice of Intent to Appeal was moot. Appellant submits that the Court inadvertently overlooked the interwoven nature of the two inquiries and that had the Court considered each issue in its context, it would have concluded the lower court judge was required to recuse himself therefore rendering all forthcoming Orders invalid and vacated, and Appellant's need for appealing and the timing therefore moot and inapplicable.

One may argue this issue to be a classic case of the colloquial "chicken or egg" dilemma. How this colloquy applies is as follows: 1) Must the Court look first at whether Appellant file a timely notice of appeal; or 2) Must the Court first determine whether the lower court jurist improperly failed to recuse himself under the circumstances existing on April 7, 202?

In its Opinion, the Court looked first (and only) at the timeliness of Appellant's appeal, applied the law as interpreted by the Court, affirmed the lower court, and did not address any

other issue. Appellant argues that the proper first consideration would have been for the Court to determine whether the lower court judge properly heard the case in the first instance.

The logical sequence of Appellant's position is as follows:

- a. Appellant argued on appeal that at the Summary Judgment hearing of April 7, 2021 (see R-10), the lower tribunal judge was presiding under a conflict of interest or other manner which required recusal;
- b. Had such recusal occurred, no order would have issued from the judge from which to form this appeal; it simply could not exist;
- c. The lower court jurist, not recusing himself, granted summary judgment in favor of Respondent's from the April 7, 2021 hearing, effectively ending Appellant's case, and that order and subsequent rulings from the same judge improperly formed the basis for this appeal;
- d. All of Appellant's issues raised on Appeal derived from the substantive rulings of the conflicted lower court judge or the mere fact that he should have recused himself;
- e. If the Court of Appeals had first examined the appealed issue of judicial recusal and determined that the judge's recusal was necessary as of April 7, 2021, then all Orders issuing from that judge from April 7, 2021 forward would be vacated, which would leave no issues presently before court at all;
- f. Had the Court so determined, then the Court would not have reached the issue of timeliness of appeal because the mandatory recusal of the lower court judge would have required reversal, vacation of prior orders, and remand to the lower court for further proceedings under the now-appointed special referee in Cherokee County.

Appellant asserts the Court of Appeals inadvertently relied on a strictly-applied filing deadline rule without considering the contextual landscape that is critical to this case, a landscape which would not be found in most other cases. Most cases on Appeal involve issues that were before a lower court and ruled upon by a properly presiding judge, with the only question before the appellate tribunal being whether the ruling should be affirmed or reversed based upon the Court's consideration of the Appeal and the standards of review applicable therein.

The present case is not simply a distinction without a difference, but a distinction that IS the difference. Rulings on appeal were rendered by an improperly presiding judge (as argued by Appellant). If the Court agreed with that argument (that argument was not reached by the Court), there would have been no further inquiry, because any rulings would have been void *ab initio*.

The current situation is akin to the following scenario – if a magistrate judge heard and convicted a defendant in a criminal case that exceeded his/her jurisdictional authority, such as a case which was only proper to be heard before a circuit judge in the Court of General Sessions, then the limit of the Court's jurisdictional authority would render any ruling null and void. Appealable issues arising out of the merits of the case itself would have no bearing – the case would simply be of no force of law, regardless of whether a statement of issues on appeal was slightly untimely filed. There would be no appealable issues because the case was void for lack of jurisdiction as a function of law: to use an extreme example, a drug trafficking conviction through a magistrate court could not stand regardless of a timeliness of appeal due to its invalidity at the outset.

The same analysis applies in the present case. If a judicial recusal/remitter is required of a jurist and not undertaken, then nothing flowing from any proceedings therefrom could have force of law, thus rendering zero issues for appeal, and any time limitations of appeal moot. The timeliness of appeal and applicability of any rules governing the same would only apply if the lower court had the proper authority to hear the case (much like the magistrate acting outside of his/her jurisdictional authority). Appellant argues, then, that in the quandary of which issue must first be addressed, the Court overlooked the necessity of determining whether the lower court's rulings could stand by first considering the judicial authority to hear the case before addressing a timeliness of appeal.

In conclusion, had the Court considered the issue of judicial recusal and found that the lower tribunal's presiding judge improperly presided over the case based upon the judicial canons under the circumstances, then no further inquiry would have been mandated because the case would have required reversal and vacation of all orders, rendering any other considerations or issues before the Court moot.

B. THE 10-DAY FILING REQUIREMENT OF S.C. CODE ANN. §62-1-308(A) IS NOT ABSOLUTE AND A GOOD CAUSE EXCEPTION COULD HAVE BEEN AFFORDED APPELLANT UNDER BOTH RULE 260, SCACR AND THE PROBATE CODE.

In its opinion, this Court relies upon *In re Est. of Cretzmeyer*, 365 S.C. 12, 13, 615 S.E.2d. 116-117 (2005) stating that “the circuit court properly dismissed the appellant’s appeal from a probate court order when the appellant failed to file the notice of appeal in the circuit court within the ten-day period provided in section 62-1-308 (a).” It’s ruling suggests an absolutism of the statute as immovable under any and all circumstances, but it is important to consider the argument below but first to distinguish *Cretzmeyer* from the case at bar. In *Cretzmeyer*, an Appellant merely “claimed” to have timely mailed its notice of appeal to the appropriate circuit

court for filing. In fact, the circuit court had absolutely no record of any filing, and it accordingly dismissed the case. *Id.* *Cretzmeyer* was not a case where an appellant was unknowingly stripped of his own representation when his attorney was disciplined, as in the present case. *Cretzmeyer* was not a case where an appellant acted promptly and diligently to file a notice of appeal in the correct manner after discovering he was no longer represented due to said disciplinary action against his counsel, as is true in the present case. Instead, *Cretzmeyer* was a case wherein an appellant simply ‘stated’ to the Court that she mailed original notices to the circuit court, yet there was absolutely no proof that such mailing had ever even occurred.

The present case is clearly distinguishable, and the distinction is of great substance and should be given substantial consideration under extraordinary circumstances. As stated in Appellant’s brief, Appellant was represented throughout the case and the rulings that ultimately became the subject of appeal. During the holidays of December 2021, unbeknownst to Appellant, his lawyer was suspended from practicing law. This occurred during the time period in which the ten-day notice period began to run. Upon Appellant’s discovery of no longer being represented, he took action to the best of his ability to file his notice and statement of issues on appeal, which he indisputably did on January 7, 2022 (R. at 133, R. at 234-237).

In its opinion, the Court in the present case rests upon *Cretzmeyer* and the statutory mandatory use of the word “must” when referencing the requirement of filing within 10 days. Indeed words of “must” and “shall” are often referred to as “mandatory” language within statutes rather than discretionary, indicating a seeming absolute. The mandatory words of “must” and “shall” appear in most, if not all, Rules governing time within which to file various pleadings, motions, affidavits, and the like. For example, Rules 208, 209, 210, 211, SCACR among others all contain the words “shall” or “must” in requiring submissions within a certain amount of days,

yet it is fairly common for enlargements of time to be granted to counsel when requested, and as more fully discussed below, Rules and statutes make clear that exceptions do apply to these otherwise hard and fast deadlines, in certain circumstances and under certain standards.

Respectfully, Appellant submits Rule 260, SCACR should in fact apply in this case due to overwhelming evidence of good cause in the record. As the Court quotes the rule in its opinion, “Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court. A case shall not be reinstated except by leave of the court, upon good cause shown....” Rule 260, SCACR.

The Court makes two findings regarding Rule 260. Addressing each in turn, it first held that Appellant did not raise Rule 260 in its statement of issues in the lower court. Appellant submits that certain points herein may have been misapprehended by the Court. Appellant respectfully submits that that Court erred in its opinion regarding preservation of issues by addressing Rule 260 as if it were the legal ‘issue’ itself, rather than merely the authority in support of the legal issue that was actually raised in the lower court.

In the lower court, Appellant raised the issue of why Appellant’s appeal should not be dismissed. On pages 234-237 of the Record on Appeal, the transcript of the lower court clearly reflects that Appellant provided numerous reasons to the Court why his appeal should not be dismissed under the deadline statute, and why he should be allowed to be heard on its merits without dismissal on statutory untimeliness. Appellant discussed at length the issue of how, during the Christmas holiday of 2021, on December 21, 2021, Appellant’s lawyer was indefinitely suspended from the practice of law, that such suspension occurred only a few days before Christmas, in the middle of the 10 day period of statutory time, and how Appellant acted

as promptly as could be expected of a nonlawyer upon his comprehension of all the facts.

Therefore, the issue of extending Appellant's time for filing, and reasons for relief from untimely filing were in fact argued - thus raised - in the lower court.

Rule 260, SCACR, much like a case, is an authority, not a legal issue in and of itself. A Rule would be a citation to support an issue or an argument regarding an issue, but simply because a citation is not stated in oral argument before the circuit court does not mean the issue has not been raised and preserved.

By way of analogy, if a Circuit Judge were hearing a motion for default, and a party argued at the hearing that it should be relieved from default because of certain reason(s), certainly the party sufficiently raised the legal issue of relief from default for preservation for appeal. If such party lost its motion, it would certainly be able to raise the issue of legal error in the Court of Appeals by citing to the South Carolina Rules of Civil Procedure related to relief from default, namely Rule 55(c) and 60(b), SCRCPP. To hold otherwise would necessarily mean that in order for a legal issue to be preserved for appeal, legal citations to caselaw or Rules would be required for every issue argued on every motion.

In summary, only the legal issue must be raised in the lower court for preservation. The question before the Court is, "was the issue raised?" The question before the Court is not "was the legal citation of authority for the issue cited in the lower court at oral argument?" As stated previously, the lower court transcript clearly reveals that the issue of relief from untimely filing was indeed raised and argued by the Appellant arguing the facts in support of the issue and clearly setting forth the issue as well. Therefore, respectfully, the Court may have overlooked that portion of transcript where the issue was both raised and preserved.

Second, the Court also ruled that Rule 260 would not apply to the present case because it applies only to the Court of Appeals and the Supreme Court. The Court essentially held that in appeals from lower tribunals to Circuit Courts, there is no appellate rule of any application to allow exceptions for untimely filing. This is anathema to both the SCACR and SCRCR. In virtually every other case of untimeliness/default, circumstances can exist by which a court may relieve a party from an untimely filing, often through a good cause standard, or possibly excusable neglect. Appellant submits that almost every trial attorney has experienced such relief either themselves or from opposition in trial courts, state appellate courts, and federal courts alike. To hold that the probate court appeal's 10-day deadline is immovable under all circumstances is contrary to the clear purpose of the Rules and the public policy reflected therein. The Rules of time for filing are certainly necessary for order and expediency, and very needed deadlines are provided, but the law favors cases to be heard on the merits, which is precisely why the law provides for circumstances by which relief may be granted in untimely filings.

The Court quotes the probate code §62-1-308(g), that “no party is required to comply with any other of the South Carolina Appellate Rules.” While the requirement of compliance may be excused, Rule 260 is not prevented from application by this section of the Probate Code. Moreover, the Probate Code does in fact contemplate Rule 260, though not by name. Section §62-1-401(b) of the Probate Code states, “[t]he court for good cause shown may provide for a different method or time for giving notice of any hearing.” Appellant was required to give ‘notice’ of an appeal, which he did, albeit untimely. Appeals in circuit court are conducted by hearings. Therefore, the lower Court had authority to accept the untimely filing, and the Court of Appeals may have overlooked or misapprehended the fact the lower Court did in fact have that

right under the Rule. Here again, the law contemplates circumstances that would justify extension or relief from technical deficiencies based upon extenuating circumstances, or good cause. Therefore, the Court may have overlooked or misapprehended not only whether Appellant raised the issue of being relieved from his untimeliness of filing, but also of the application of the law and public policy supporting such relief under circumstances as extraordinary as Appellant faced.

Respectfully submitted,

s/ William R. McKibbin III
(Bar No. 68454)
601 E. McBee Ave, Ste. 104
Greenville, SC 29601
864.235.0071, 864.235.0072 (f)
will@legalcarolina.com
Attorney for Appellant

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CERTIFICATE OF SERVICE

I certify that on April 17, 2025, I served the Appellant's Petition for Rehearing on the Respondents by delivering a copy via email to counsel of record and others if, and as, indicated below:

Jenna McLeod
Brown Massey Evans McLeod and Haynsworth
106 Williams Street
Greenville, SC 29601
(864) 271-2474
Via email: jennamcleod@bmemhlaw.com
Attorney for Respondents

Jenny Abbott Kitchings
Clerk of South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
Via email filing only to: ctappfilings@sccourts.org

Respectfully submitted,

s/ William R. McKibbon III
(Bar No. 68454)

601 E. McBee Ave, Ste. 104
Greenville, SC 29601
864.235.0071, 864.235.0072 (f)
will@legalcarolina.com
Attorney for Appellant