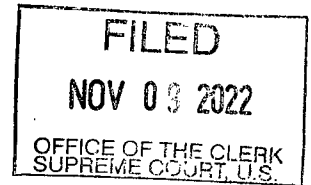


No. 22-6099

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT LEWIS — PETITIONER
(Your Name)

vs.

Hoke County — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fourth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert Lewis
(Your Name)

P.O. Box 600, Nash Correctional Institution
(Address)

Nashville, NC 27856
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- I. Whether An Appellee's Nonmandatory Response That Fully Briefed The merits Of The Issue Subject To Waiver Without Prejudice Or Unfair Surprise May Be The Exception That Inhibits A Court Of Appeal's Discretion To Invoke The Waiver Doctrine ?
- II. Whether The Fourth Circuit's Application Of Local Rule 34(b) Creates A Heightened Pleading Standard For How An Issue Must Be Framed In The Appellant's Brief To Avoid Waiver Causes Pro Se Litigants To Lose Rights Because Of A Nonwillful Failure To Comply With Its Requirement
- III. Whether A Court Of Appeals May Violate A Litigant's Right To Equal Protection Of The Laws By Refusing To Apply A Well Settled Rule Of Law Equally Amongst The Litigants For Whom The Law Was Designed ?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Hoke County
Hubert Peterkin
ABL Food Service, A/K/A Summit Food Services, LLC
Southern Health Partners
Nekia Revels
Kevin Edge
Berniece, ABL Food Service Manager

RELATED CASES

- Lewis v. Hoke County, No. 1:17-cv-987, U.S. District Court for the Middle District of North Carolina. Judgment entered Feb. 1, 2022.
- Lewis v. Hoke County, No. 22-6171, U.S. Court of Appeals for the Fourth Circuit. Judgment entered May 24, 2022.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☒ reported at Westlaw 2022 WL 292928; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 24, 2022.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 13, 2022, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VIII.

U.S. Const. Amend. XIV

28 U.S.C. §1254(1)

42 U.S.C. §1983

STATEMENT OF THE CASE

Plaintiff Robert Lewis, a prose prisoner, filed this Action on October 30, 2017 against several defendants for denial of adequate treatment for his diabetes, denial of adequate medical diet and denial of adequate food and nutrition. (see generally Compl., Doc. 2). Between January 21, 2020 and January 22, 2020, all Defendants moved for summary judgment. (Docs. 66, 69, 74, 76). Although the Plaintiff filed his cross-motions for summary judgment timely (Docs. 104-2 - 104-5), the Clerk did not receive his filings until five months after the filing deadline, due to an error in mailing made by prison officials. As a result, on September 28, 2020, the district court entered Judgment adopting the magistrate's Recommendation to grant Defendants summary judgment due to Plaintiff's failure to respond within the allotted time. (Doc. 103). On October 5, 2020, the Plaintiff filed a motion for Reconsideration of that decision. (Doc. 104). Then, on December 2, 2021, the district court held an evidentiary hearing concluding that the Plaintiff's cross-motions for summary judgment were timely filed under the Prison Mailbox Rule, and gave Defendants an opportunity to respond. (see Docs. 122-124). Then, on February 1, 2022, the district court granted Plaintiff's motion for Reconsideration holding that his cross-motions were timely filed, but construed those motions as additional Objections to the magistrate's Recommendation. (Doc. 126). That same day, the district court also held that the Plaintiff's Objections were not sufficient enough to establish a true ground for objection, and granted all Defendants with summary judgment. (Id.). Thereafter, the Plaintiff timely appealed. An informal briefing schedule was set. Then, on May 24, 2022, the Fourth Circuit affirmed the district court's dismissal of Plaintiff's case, holding that the Plaintiff waived his right to challenge the district court's Judgment by failing to raise it as an issue in his Informal Brief. (4th Cir. Per Curiam Opinion, Doc. 29). The Plaintiff now seeks Certiorari of that decision under the questions presented in the foregoing Petition.

REASONS FOR GRANTING THE PETITION

I. An Appellant Should Not Lose The Right To Appeal An Issue That Was Improperly Raised In His Opening Brief When The Mistake Caused Appellees No Harm And The Issue Subject To Waiver Was Fully Briefed Without Prejudice Or Unfair Surprise.

In the present case, the record before the Fourth Circuit showed that Mr. Lewis designated the district court's February 1, 2022 Order as a judgment he intended to appeal, in the Jurisdiction section of his Informal Brief. (see Plaintiff-Appellant's Informal Brief, D.E. 18). However, the Fourth Circuit held that Mr. Lewis waived his right to challenge this particular judgment solely because the issue statements in his Informal Brief did not state in exact words that he was appealing the district court's conclusion that his "objections were not specific to the particularized legal recommendations made by the magistrate judge." (see 4th Cir. Percuriam Opinion, D.E. 29, Appendix A).

This pleading technicality was clearly unintentional as the Argument section of Mr. Lewis' Informal Brief (under Issue #1) showed that he did in fact challenge the district court's conclusion that his objections were not specific, by listing each claim dismissed by the district court in alphabetical order; citing to the docket entry and page numbers where the district court's conclusions could be found; and providing the reasons with supporting authorities showing why the district court's conclusions were wrong. (see Plaintiff-Appellant's Informal Brief, D.E. 18, p. 3-22).

The defendants were not prejudiced by Mr. Lewis' mistake, as each Appellee-defendant submitted a nonmandatory response that fully briefed the merits of the issue subject to waiver without prejudice or unfair surprise. (see Appellee-defendants' Informal Response

Briefs, D.E. 19; D.E. 20; D.E. ...1). Several circuit courts of F., including the Fourth, agree that where the Appellee has not been misled or prejudiced by the Appellant's mistake, and had full opportunity to respond, the issue subject to waiver may be reviewed. See Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th cir. 1988) (considering plaintiff-Appellant's pro se Appellate brief that did not set forth an argument for the one issue on appeal in accordance with Fed. R. App. P. 28 (A)(4) because defendant-Appellee was able to fully address that singular issue); United States v. Ullah, 976 F.2d 509, 514 (9th cir. 1992) ("we consider an argument not raised in the opening brief if ... (3) failure to properly raise the issue does not prejudice the defense of the opposing party."); Eriesson Inc. v. TCL Comm'n Tech. Holding Ltd., 955 F.3d 1317, 1322-23 (Fed. cir. 2020) ("while there is no general rule when we exercise our discretion to reach waived issues, we have done so where ... the issue has been fully briefed by the parties."); ESLIC v. HARAISON, 813 F.2d 370, 373 n.3 (11th cir. 1987) (refusing to apply waiver because Appellee not misled or hampered in its ability to respond); Canady v. Crestar Mortgage Corp., 109 F.3d 969, 974 (4th cir. 1997) ("[A]n error in designating the issue appealed will not result in a loss of appeal as long as the intent to appeal a specific judgment can fairly be inferred and the Appellee is not prejudiced by the mistake.").

In sum, the facts and cases above sufficiently show why the Supreme Court should no longer permit reviewing courts to have discretion to invoke the Waiver Doctrine, in situations where both parties have fully briefed the issue subject to waiver without prejudice or unfair surprise, as the sole purpose of the waiver doctrine is to avoid unfairness to an Appellee and minimize the risks of an ill-advised opinion being rendered on an unbriefed issue.

II. The Fourth Circuit Local Rule 34(b) Does Not Provide Fair Notice To Pro Se Litigants As To How An Issue Must Be Phrased In The Opening Brief In Order To Preserve Appellate Review.

Without question, the Fourth Circuit's Local Rule 34(b) causes pro se litigants to lose rights because of a nonwillful failure to comply with its requirements. Specifically, Local Rule 34(b) states in pertinent part: "[t]he court will limit its review to the issues raised in the informal brief." (4th cir. R. 34(b)). However, nothing in the general terms of this Local Rule explains how the Fourth Circuit expects an issue to be framed in the informal brief in order to give fair notice to the Appellee of the issue the Appellant seeks to review. Even though, Federal Rule Of Appellate Procedure 47(A)(2) states: "A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement."

To that end, the record showed that Mr. Lewis designated the district court's February 1, 2022 Order as a judgment he intended to appeal in the Jurisdiction section of his Informal Brief. (see Plaintiff-Appellant's Informal Brief, D.E. 18). In support of this intention, Mr. Lewis' Informal Brief articulates in issue statement number One that: "The District Court Overlooked Several Material Facts In Dispute Related To Plaintiff's Deliberate Indifference Claims." (Id. at 3). Thereafter, the Argument section under Issue #1 lists in alphabetical order everyone of Mr. Lewis' claims that the district court dismissed followed by citations to the record where the district court's conclusions can be found as well as citation to the authorities showing why the district court's conclusions were wrong. (see Id. at 3-22).

Despite this showing, the Fourth Circuit still held that Mr. Lewis waived his right to challenge the district court's grant of summary judgment to the appellee-defendants, solely because the issues identified in Mr. Lewis' Informal Brief did not expressly state in exact words that he was challenging the district court's holding that his "objections were not specific to the particularized legal recommendations made by the magistrate judge." (see 4th Cir. Per Curiam Opinion, D.E. 29, Appendix A). This holding, however, conflicts with the Federal Rules of Appellate Procedure, as the contentions and citations to the record and authorities in the Argument section of Mr. Lewis' Informal Brief under Issue #1 would have been a sufficient challenge to the district court's conclusions under Fed. R. App. P. 28(A)(8)(A).

More to the point, waiver is supposed to be a voluntary or intentional act. Kentrick v. Ryan, 540 U.S. 443, 458 at n.13, 124 S.Ct. 906, 157 L.Ed. 2d 867 (2004). Yet, Mr. Lewis' Informal Brief clearly demonstrated that he intended to challenge the district court's conclusions that dismissed his case. However, because the Fourth Circuit's Local Rule 34(b) does not provide fair notice to pro se litigants as to how an issue should be phrased to preserve Appellate review, it is being enforced in a manner that causes pro se litigants to lose rights due to a nonwillful failure to comply with the rules requirement.

"This is not a mere coincidence. Mr. Lewis did a search on the West Law legal site, amongst all federal courts, by typing the following phrase in the search engine: "issues not raised in appellate brief pro se cases". The results showed that nearly 10,000 pro se litigants (undoubtedly much more) who lost the right to appeal an issue that was improperly raised in their opening briefs, with more than a thousand being from the Fourth Circuit. This massive loss of rights may reasonably be attributed to the lack of Local Rules that provide fair notice to pro se litigants regarding how an issue should be framed in the opening brief, such that certiorari should be granted to decide the matter.

III. The Fourth Circuit Violated The Equal Protection Clause Of The Fourteenth Amendment By Refusing To Liberally Construe Mr. Lewis' Informal Brief In The Same Way It Did For Other Pro Se Litigants Similarly Situated.

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed. 2d 786 (1982).

In the instant case, Mr. Lewis is a pro se litigant who sits similarly situated with all other pro se litigants whom must assert their right of appeal through the Fourth Circuit Court of Appeals from all states within its jurisdictional reach. Moreover, in Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed. 2d 652 (1972), the Supreme Court held that all pro se pleadings must be liberally construed, however inartfully plead. And the Fourth Circuit Court of Appeals recognized its duty to follow this mandate in Gordan v. Leake, 574 F.2d 1147, 1151 (4th Cir. 1978).

Despite this awareness, the Fourth Circuit still refused to liberally construe Mr. Lewis' Informal - Appellant Brief to see if any of the pleadings contained therein may be construed as a challenge to the district court's conclusions of law that dismissed his case, as it did for the following pro se litigants herein below.

By way of example, in the matters of Aekbar v. McCall, 744 Fed. Appx. 178 (4th Cir. 2018); Farguhar v. McCarthy, 814 Fed. Appx. 786 (4th Cir. 2020); Duff v. Potter, 665 Fed. Appx. at 244 (4th Cir. 2016); Mackay v. City of Virginia Beach, 884 F.2d 1389 (4th Cir. 1989); and Hawkins v. Saul, 796 Fed. Appx. 159 (4th Cir. 2019), the Fourth Circuit

Court of Appeals liberally construed these pro se Appellants' Informal Briefs for assignments of error. Yet, when Mr. Lewis submitted a Petition for Rehearing and Rehearing En Banc (see D.E. 31) to alert the Court of its failure to liberally construe his pro se Informal Brief for assignments of error, the Fourth Circuit refused to acknowledge its obligation to conduct such review and dismissed Mr. Lewis' Petition. (see D.E. 33).

However, because Mr. Lewis' Informal Brief contained nearly 20 -pages of arguments and citations to the district court's February 1, 2022 Order that dismissed his claims against all defendants (see Plaintiff-Appellant's Informal Brief, D.E. 18, p. 3 - 22), the text of the Fourth Circuit's Per Curiam Opinion (D.E. 29, Appendix A) was required by law to expressly state that Mr. Lewis' Informal Brief was liberally construed for assignments of error before concluding that he waived the right to challenge the district court's judgments that dismissed his case, in the same way it did for the pro se litigants described above.

This was more than a misapplication of the law. This was an outright refusal by the Fourth Circuit to apply a rule of law that it had no discretion to ignore, as well as a decision that violates the Equal Protection Clause of the Fourteenth Amendment to the United States' Constitution. For these reasons, the Supreme Court should grant Certiorari to remind Courts of Appeal of their never-ending duty to uphold the constitutional rights of all litigants equally.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert D. Lewis

Date: November 9, 2022