

REL: October 26, 2018

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170095

Ex parte Allen Kennemer and Nina G. Kennemer

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS**

(In re: Allen Kennemer and Nina G. Kennemer

v.

Shelby County Board of Equalization)

**(Shelby Circuit Court, CV-16-900537;
Court of Civil Appeals, 2160538)**

MENDHEIM, Justice.

1170095

Allen Kennemer and Nina G. Kennemer petitioned this Court for a writ of certiorari to review whether the Court of Civil Appeals' affirmance, without an opinion, of a judgment of the Shelby Circuit Court dismissing the Kennemers' appeal from a ruling of the Shelby County Board of Equalization ("the Board") conflicts with Shoals Mill Development, Ltd. v. Shelby County Board of Equalization, 238 So. 3d 1253 (Ala. Civ. App. 2017). We issued the writ, and we reverse and remand.

I. Facts and Procedural History

The underlying case concerns a dispute between the Kennemers and the Board as to the assessed value of real property owned by the Kennemers ("the property"). The Board informed the Kennemers, by notice dated May 31, 2016, that it had ruled that the fixed value of the property was \$122,700 for purposes of assessment. According to the Kennemers, however, the "true and fair value" of the property was \$89,405.50. The Kennemers filed an appeal from the Board's ruling.

Section 40-3-25, Ala. Code 1975, states:

"All appeals from the rulings of the board of equalization fixing value of property shall be taken within 30 days after the final decision of said board fixing the assessed valuation as provided in

1170095

this chapter. The taxpayer shall file notice of said appeal with the secretary of the board of equalization and with the clerk of the circuit court and shall file bond to be filed with and approved by the clerk of the circuit court, conditioned to pay all costs, and the taxpayer or the state shall have the right to demand a trial by jury by filing a written demand therefor within 10 days after the appeal is taken."

On June 30, 2016, the Kennemers filed a notice of appeal in the circuit court. It is undisputed that the filing of the notice of appeal with the circuit court was timely. Also on June 30, 2016, the Kennemers mailed a notice of appeal to the Board via certified mail. The notice was received by the Board on July 5, 2016.

On September 29, 2016, the Board filed a motion in the circuit court seeking to dismiss the appeal as untimely filed. According to the Board, the Kennemers' notice of appeal was untimely because the Board did not receive the notice within 30 days of its May 31, 2016, ruling. The Board relied on the Court of Civil Appeals' decision in Target Corp. v. Jefferson County Board of Equalization, 197 So. 3d 1006 (Ala. Civ. App. 2015), as support for its argument.

The Kennemers filed a response to the motion to dismiss, arguing (1) that their appeal was timely filed because it was

1170095

sent to the Board by certified mail postmarked on or before the 30th day as provided by § 40-3-25 and (2) that § 40-3-25 is ambiguous and should be construed in favor of the Kennemers, i.e., the taxpayers, because, they say, "where a tax statute is reasonably subject to two constructions, the interpretation most favorable to the taxpayer must be adopted by the Court. Scott & Scott v. City of Mountain Brook, 844 So. 2d 577, 590 (Ala. 2006), citing Williams v. Pugh, 24 Ala. App. 57, 129 So. 792 (1930)." The Kennemers acknowledged that the Court of Civil Appeals held in Target Corp. that Target did not satisfy the requirements of § 40-3-25 where it mailed its notice of appeal on the day the notice was due, but the notice was not received by the board within 30 days of the board's ruling. But, the Kennemers asserted, the Court of Civil Appeals in Target Corp. did not address the question they were presenting here:

"In the final paragraph of [Target Corp.], the Court stated that Target '... made no argument that the language [in] [§] 40-3-25 can be construed as allowing a copy of a notice of appeal to be mailed or postmarked on or before the time prescribed by the statute, thereby constituting a timely filing of the notice of appeal.' Target Corp., [197 So. 3d at 1008]. Unlike the Appellant in that case, [the Kennemers] intend[] to explore this issue."

1170095

Further, the Kennemers contended that § 40-3-25 should be read "in conjunction with ... [§] 41-22-20(d), [Ala. Code 1975, a part of the Alabama Administrative Procedure Act],"¹ as to whether mailing a notice to the Board, which is an adverse party for purposes of the appeal, satisfied the requirements of § 40-3-25.

On October 29, 2016, the Board filed a supplemental brief in support of its motion to dismiss, arguing (1) that tax appeals require strict compliance with the applicable statutory provisions for filing an appeal and (2) that mailing a notice of appeal does not constitute a "filing" for purposes of § 40-3-25. The Board specifically referenced the "mailbox rule" in its supplemental brief and contended that that rule should not be applied to § 40-3-25.

The Kennemers filed a response to the Board's supplemental brief. In their response, the Kennemers noted, in part, that "at least one Alabama statute provides that an appeal to administrative agencies may be filed pursuant to the

¹Section 41-22-20(d) provides, in part, "[a]ny notice required herein which is mailed by the petitioner, certified mail return receipt requested, shall be deemed to have been filed as of the date it is postmarked."

1170095

'mailbox rule,'" apparently alluding to § 41-22-20(d), Ala. Code 1975.

On November 3, 2016, the circuit court held a hearing on the Board's motion to dismiss. On that same date, the circuit court issued an order granting the motion to dismiss on the basis that the appeal was untimely filed. The order states:

"[T]his appeal [is] dismissed due to lack of jurisdiction in that [the Kennemers] failed to file notice of appeal with the secretary of the Board of Equalization of Shelby County, Alabama, within 30 days after the final decision of the Board as required by § 40-3-25, Code of Ala. 1975. The date of the final decision appealed from was May 31, 2016. Notice of appeal was mailed to the Board on June 30, 2016, but not received until July 5, 2016."

The Kennemers filed a postjudgment motion; that motion was denied by operation of law. The Kennemers then appealed to the Court of Civil Appeals.

On appeal, the Kennemers summarized their argument as follows in their brief to the Court of Civil Appeals:

"The primary thrust of the [Kennemers'] argument is that their appeal of the decision of the Shelby County Board of Equalization was timely filed, and that the appeal statute in question, Code of Alabama, [§] 40-3-25[,], can be construed to permit timely filing of the appeal with the Board by means of certified mail postmarked on or before the 30th day allowed by that statute. The taxpayers contend that because of the mailbox rules contained in [§] 40-1-45[,], Ala. Code 1975[,] and [§] 41-22-1,

1170095

[Ala. Code 1975 (title to the Alabama Administrative Procedure Act),] that such an interpretation is reasonable and that because [§] 40-3-25 has more than one reasonable interpretation, that the construction which most favors the taxpayers should be adopted."²

The Court of Civil Appeals unanimously affirmed the November 2016 order without an opinion. The Kennemers filed a petition for a writ of certiorari with this Court, contending that the decision of the Court of Civil Appeals conflicts with Shoals Mill Development, Ltd. v. Shelby County Board of Equalization, 238 So. 3d 1253 (Ala. Civ. App. 2017), as to whether the mailbox rule applies to filings pursuant to § 40-3-25. We granted the petition and issued the writ.

²Although the Kennemers did not cite § 40-1-45, Ala. Code 1075, in their arguments to the circuit court, they argued to that court that, under Alabama law, the mailing of their notice of appeal to the Board satisfied the requirements of § 40-3-25, and they referenced at least one other statute, § 41-22-20(d), as supporting the argument that § 40-3-25 should be construed as allowing the application of the mailbox rule to satisfy the filing requirement as to the Board. Thus, on appeal, § 40-1-45 was merely an additional authority provided in support of the argument the Kennemers made to the circuit court. See, e.g., Beavers v. County of Walker, 645 So. 2d 1365, 1372 (Ala. 1994); see also, e.g., Ex parte Hatfield, 37 So. 3d 733, 737 (Ala. 2009) (holding that arguments were preserved for appellate review where the trial court clearly understood the nature and the grounds for the objections).

II. Standard of Review

"Our standard of review is de novo: 'Because the issues presented by [this appeal] concern only questions of law involving statutory construction, the standard of review is de novo. See Taylor v. Cox, 710 So. 2d 406 (Ala. 1998).' Whitehurst v. Baker, 959 So. 2d 69, 70 (Ala. 2006)."

Ex parte Birmingham Bd. of Educ., 45 So. 3d 764, 767 (Ala. 2009).

III. Analysis

The Kennemers argue, as they did before the circuit court, that they complied with the requirements of § 40-3-25 by timely mailing their notice of appeal to the Board (in addition to timely filing the notice with the circuit court). The Kennemers contend that the filing requirement in § 40-3-25 is subject to more than one reasonable interpretation and that the interpretation most favorable to the taxpayer should be the one followed -- i.e., that a notice of appeal is timely as to the Board if the notice is mailed on or before the 30th day after the Board's ruling. As they did in their appellate brief filed with the Court of Civil Appeals, the Kennemers bolster their argument by reference to § 40-1-45, Ala. Code 1975, which is part of the "General Provisions" applicable to Title 40. Section 40-1-45(a)(1) provides, in part:

1170095

"(1) Date of delivery. If any return, claim, statement, or other document required to be filed ... within a prescribed period or on or before a prescribed date under authority of any provision of [Title 40] is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, ... the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be."

(Emphasis added.)

In Shoals Mill, supra, the Court of Civil Appeals held that § 40-3-25 and § 40-1-45 must be read in pari materia and that the mailing of a notice of appeal to the board of equalization before the expiration of the 30-day period prescribed in § 40-3-25 satisfied the timely filing requirements of that section. The Shoals Mill court concluded:

"Section 40-1-45, by its plain language, applies to notices of appeal that are required to be filed under any part of the revenue code. ... Because the undisputed facts demonstrate that Shoals Mill's notice of appeal was timely mailed to and was received by the secretary of the Board, § 40-1-45(a) operates to make the date of mailing of the notice of appeal the date the notice of appeal was filed with the secretary of the Board. We therefore conclude that the trial court erred in dismissing Shoals Mill's appeal."

1170095

238 So. 3d at 1260.

As noted above, the Kennemers argue that the Court of Civil Appeals' decision in their case conflicts with that court's decision in Shoals Mill. We agree.³ The mailbox rule applies to the filing of a notice of appeal with the Board under § 40-3-25. Accordingly, the Kennemers' notice of appeal was timely filed with the Board, and the circuit court erred in dismissing their appeal from the Board's May 2016 ruling.

IV. Conclusion

Based on the foregoing, we reverse the judgment of the Court of Civil Appeals affirming the November 2016 order, and we remand the case for further proceedings consistent with this opinion.

³The Board does not argue that Shoals Mill was wrongly decided or that it should be overruled. Instead, the Board argues that the Kennemers "waived" application of § 40-1-45 by failing to cite that statute in their arguments to the circuit court: "[T]he Board contends this 'mailbox rule' may be waived if not raised in the trial court." Board's brief, at 7. We reject the Board's waiver argument because the Kennemers clearly argued to the circuit court that, under Alabama law, timely mailing of notice to the Board satisfies the requirements of § 40-3-25 as to the Board. See note 2, *supra*.

1170095

REVERSED AND REMANDED.

Stuart, C.J., and Bolin, Parker, Shaw, Main, Wise, and
Bryan, JJ., concur.

Sellers, J., concurs specially.

1170095

SELLERS, Justice (concurring specially).

I concur specially in the main opinion's holding that the mailbox rule applies to the filing of a notice of appeal with a county board of equalization under § 40-3-25, Ala. Code 1975. As that rule is applied to this case, I agree that the taxpayers' notice of appeal was timely filed with the Shelby County Board of Equalization ("the Board"). Contrary to the Board's argument and the Court of Civil Appeals' finding in Target Corp. v. Jefferson County Board of Equalization, 197 So. 3d 1006, 1008 (Ala. Civ. App. 2015), the application of the mailbox rule under this section cannot be waived, nor must it be affirmatively pleaded or its applicability specifically invoked. Simply put, it applies to all tax filings unless there is a specific exemption from its effect.

Section 40-1-45, Ala. Code 1975, is included in the general provisions of Title 40, and the mailbox rule (as codified therein) is applicable to all filings under Title 40 unless specifically specified otherwise. In fact, § 40-1-45(d) states as much:

"(d) Exceptions. This section shall not apply with respect to

1170095

"(1) The filing of a document in, or the making of a payment to any court.

"(2) Currency or other medium of payment unless actually received and accounted for, or

"(3) Returns, claims, statements, or other documents, or payments which are required under any provision of this title to be delivered by any method other than by mailing."

(Emphasis added.) Because § 40-3-25 does not require a notice of appeal "to be delivered by any method other than mailing," this exception is not applicable, and the general rule applies.

The Board is correct in arguing that "'[t]he right of appeal in tax proceedings is a right conferred by statute and must be exercised in the mode and within the time prescribed by the statute.'" Ex parte Shelby Cty Bd. of Equalization, 159 So. 3d 1, 4 (Ala. 2014) (quoting Denson v. First Nat'l Bank, 276 Ala. 146, 148, 159 So. 2d 849, 850 (1964)). However, the statute here, read in its entirety, applies the mailbox rule as the default rule under Title 40. Indeed, the Alabama Tax Tribunal and its predecessor, the Alabama Department of Revenue Administrative Law Division, have generally applied the mailbox rule in § 40-1-45 in reviewing the timeliness of

1170095

petitions and appeals filed with the Alabama Tax Tribunal or the Alabama Department of Revenue pursuant to Title 40. See Hyster-Yale Grp. Inc. v. Alabama Dep't of Revenue, No. F. 00-598 (Ala. Tax Trib. Sept. 15, 2017); Michelin North America, Inc. v. Alabama Dep't of Revenue, No. F. 00-154 (Ala. Tax Trib. Sept. 15, 2017); Burton v. Alabama Dep't of Revenue, No. Inc. 10-634 (Admin. L. Div. Aug. 3, 2010); and Smith v. Alabama Dep't of Revenue, No. Inc. 10-535 (Admin. L. Div. July 23, 2010). It logically follows that this same common-sense rule should be applied to filings under Chapter 3 of Title 40.

Furthermore, because the mailbox rule is the default rule under Title 40, its application cannot be waived. A taxpayer's timely filing of an appeal under this statute does not become untimely merely because he or she fails to cite § 40-1-45 to the circuit court. Instead, a party moving for dismissal based on an alleged untimely filing has the burden of showing that the mailbox rule does not apply.