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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Douglas J. Rosinski,

Appellant,

V.

Vet.App. No. 17-3293

Robert L. Wilkie,
Secretary of Veterans Affairs,
Appellee.

**MR. ROSINSKI'S OPPOSED MOTION TO RECALL THIS COURT'S
TRANSMISSION OF THE SECRETARY'S UNTIMELY NOTICE OF APPEAL**

In accordance with U.S. Vet.App. Rule 27, Mr. Rosinski, through counsel, Kenneth M. Carpenter, moves that this Court recall this Court's premature and erroneous transmission of the Secretary's untimely notice of appeal to the United States Court of Appeals for the Federal Circuit. In support of his motion, Mr. Rosinski asserts as follows:

1. Pursuant to Rule 27, Mr. Rosinski's counsel, Kenneth M. Carpenter, has contacted Mr. Nathan Kirschner counsel for the Secretary to inform him of Mr. Rosinski's intent to file this motion and has been advised that the Secretary will oppose Mr. Rosinski's motion and intends to file a response in opposition.
2. The Clerk's Office has erroneously and prematurely transmitted the Secretary's untimely notice of appeal to the United States Court of Appeals for the Federal Circuit (Federal Circuit) to that Court.
3. The Clerk's transmission is erroneous because it states that "A total of 1 days elapsed between judgment and filing of the appeal." Clerk's Letter dated August 19, 2020. In accordance with U.S. Vet App Rule 36(b)(2)(B), judgment was effective on May 29, 2020, the date on which the Court rendered its decision denying the Secretary's motion for full Court consideration. Therefore, the Secretary's July 30, 2020, notice of appeal is untimely as a matter of law.
4. The Clerk's transmission is premature because there is a pending and unresolved motion to dismiss the Secretary's notice of appeal. Based on the Clerk's letter of August 19, 2020, this Court has erroneously allowed the Clerk's office to enter judgment on July 29, 2020. Judgment in this case became effective as a matter of law on July 28, 2020, in accordance

with U.S. Vet App Rule 36(b)(2)(B).

5. The Clerk's transmission is also premature because it is contrary to the precedent of the Federal Circuit. That Court has addressed the question of jurisdiction to consider a motion to dismiss an untimely appeal in *Gilda Industries, Inc. v. U.S.*, 511 F.3d 1348 (2008) and held that filing of untimely notice of appeal did not divest the Court of International Trade of jurisdiction to address a motion to extend the timely for filing the notice of appeal.
6. In *Gilda*, the Federal Circuit noted that ordinarily, the act of filing a notice of appeal confers jurisdiction on an appellate court and divests the trial court of jurisdiction over matters related to the appeal. *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982); 20 James Wm. Moore, Moore's Federal Practice § 303.32[1] (3d ed.1997). That rule, however, does not extend to deficient notices of appeal. *Gilda*, 511 F.3d 1350.
7. In *Gilda*, the Federal Circuit explained that to the contrary, "[w]here the deficiency in a notice of appeal, **by reason of untimeliness**, lack of essential recitals, or reference to a non-appealable order, is clear to the district court, it may disregard the purported notice of appeal and proceed with the case, knowing that it has not been deprived of

jurisdiction.” (emphasis added) *Ruby v. Sec’y of U.S. Navy*, 365 F.2d 385, 389 (9th Cir.1966) (*en banc*); *see also Rucker v. Dep’t of Labor*, 798 F.2d 891, 892 (6th Cir.1986) (“As a general rule, a district court loses jurisdiction over an action when a party perfects an appeal unless that appeal is untimely, is an appeal from a non-appealable non-final order, or raises only issues that were previously ruled upon in that case by the appellate court.”); *In re Grand Jury Proceedings*, 795 F.2d 226, 231 (1st Cir.1986) (same); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 340–41 (10th Cir.1976) (same). *Id.*

9. The Federal Circuit relied upon Professor Moore’s treatise summarizes the point as follows:

A notice of appeal that is deficient because **it is untimely** or because it lacks the essential recitals does not transfer jurisdiction to the circuit court. If it is clear to the district court that the notice of appeal is deficient, it may disregard the purported notice and proceed with the case. Thus, if an appeal is filed after the filing deadline has passed and no extension is granted, the case may proceed in the district court.

20 Moore, *supra*, § 303.32[2][b][iv][A] (footnotes omitted) (emphasis added); *see also* 16A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3950.1 (3d ed. 1999) (“The timeliness of the filing of the notice of appeal, as indicated, has come to be of critical

importance in jurisdictional terms.”). *Gilda*, 511 F.3d 1350.

10. The Federal Circuit further relied upon the Supreme Court’s decision in *Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 2366, 168 L.Ed.2d 96 (2007), which it cited for the following proposition: “Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement.” *Id.*

11. The Federal Circuit concluded that:

Because *Gilda*’s notice of appeal was filed **a day** late, the notice of appeal was untimely. As such, it neither conferred jurisdiction on this court nor divested the trial court of jurisdiction to entertain *Gilda*’s subsequent motion to extend the filing deadline.

Id. (emphasis added).

12. In this matter, the Secretary’s filing of his notice of appeal on July 30, 2020, was two days late and thus untimely. Mr. Rosinski’s pending motion to dismiss does not confer jurisdiction on the Federal Circuit. More importantly, it does not divest this Court of entertaining Mr. Rosinski’s pending motion to dismiss the Secretary’s untimely motion to dismiss.
13. The relief sought by Mr. Rosinski is the immediate recall of the Clerk’s transmission of the Secretary’s untimely notice of appeal to the Federal Circuit and a decision on his motion to dismiss with prejudice the

Secretary's untimely notice of appeal to the Federal Circuit.

WHEREFORE, Mr. Rosinski respectfully requests that this Court recall the Clerk's transmission of the Secretary's untimely notice of appeal to the Federal Circuit forthwith.

Respectfully Submitted,

/s/Kenneth M. Carpenter

Kenneth M. Carpenter

Counsel for Appellant

Douglas J. Rosinski

Electronically filed on August 19, 2020