

STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2017-0295

APPEAL OF JAMES COLE

REPLY BRIEF OF APPELLANT, JAMES COLE

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I. INTRODUCTION

Now comes James Cole (hereinafter “Mr. Cole”), and hereby replies to the State’s March 8, 2018 brief in the matter of APPEAL OF JAMES COLE, (DOCKET No. 2017-0295), pursuant to Supreme Court Rule 16 and this Honorable Court’s order in the above captioned matter dated September 20, 2017. This reply brief is for the specific purpose of responding to the State’s argument that the case should be dismissed on the grounds of subject matter jurisdiction.

II. QUESTION PRESENTED

Does this Honorable Court have subject matter jurisdiction over this case?

III. STATUTORY AND OTHER PROVISIONS IN ISSUE

NH RSA 514:9 Amendments

Amendments in matters of substance may be permitted in any action, in any stage of the proceedings, upon such terms as the court shall deem just and reasonable, when it shall appear to the court that it is necessary for the prevention of injustice; but the rights of third persons shall not be affected thereby.

Source. RS 186:11. CS 198:11. GS 207:9. GL 226:9. 1879, 7:1. PS 222:8. PL 334:9. RL 390:9.

NH RSA 541:6 Appeal

Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.

Source. 1913, 145:18. PL 239:4. 1937, 107:17; 133:78. RL 414:6.

IV. STATEMENT OF THE FACTS

On May 26, 2017, Mr. Cole filed with this Honorable Court an appeal, which contained an error listing the State Employees' Association SEIU Local 1984 (SEA) as the petitioner. *See* Petition at 1 (May 26, 2017). On June 12, 2017 the State filed a motion to dismiss/motion for summary affirmance, which asserted, in part, that SEA does not have standing and that this Court does not have subject matter jurisdiction. Appellee's Mot. Dismiss/Mot. Summ. Affirm. at 4. Mr. Cole then filed simultaneously a motion to amend and an objection to the State's motion to dismiss/motion for summary affirmance on June 23, 2017. Pet. Mot. Amend; Pet. Object/Resp. State's Mot. Dismiss/Mot. Summ. Affirm. In these documents, Mr. Cole sought to have himself added as petitioner. *Id.* In an order dated September 21, 2017, this Court accepted Mr. Cole's motion to amend, denied the State's motion for summary affirmance, and denied the State's motion to dismiss without prejudice.

V. ARGUMENT

A. This Court has subject matter jurisdiction over this appeal because Mr. Cole was petitioner during the entirety of the proceedings and the clerical error on the initial filing this this Court is nothing more than a misnomer, and amounts to a harmless error.

This Court has subject matter jurisdiction over this appeal. *See* RSA 541:6; *see* RSA 514:9; Petition at 1 (May 26, 2017); Pet. Mot. Amend Pet. Although there was an error made in the initial filing, Mr. Cole, was in fact, always the appellee/petitioner in this

case. *See* Pet. Mot. to Amend. It was a mere misnomer, due to a clerical error that resulted with the appeal being initially filed by the State Employees' Association. *See* Petition at 1 (May 26, 2017), *see* Pet. Mot. Amend. Pet. The State has argued in its brief that this Court lacks subject matter jurisdiction because Mr. Cole was added as an appellant after the 30-day limit imposed by RSA 541:6, and relies upon the ruling from *Appeal of Carreau*. Appellee Brief at 11, 17. The decision in *Carreau*, however, is distinguishable from the facts at issue here. *See Appeal of Carreau*, 157 N.H. 122 (N.H. 2008); *See* Petition at 1 (May 26, 2017), *see* Pet. Mot. Amend. Pet. In *Carreau*, the initial filing of the appeal was made after the 30-day timeline had passed. *Carreau*, 157 N.H. at 123. Here, the initial filing was timely, but merely contained a clerical error as to the Party. *See* Petition (May 26, 2017); *see* Pet. Mot. Amend Pet. As a result, the finding in *Carreau* is distinct from the facts of this case, and thus does not control in this instance. *See Carreau*, 157 N.H. at 123; *see* Petition (May 26, 2017); *see* Pet. Mot. Amend Pet.

This situation is more akin to a misnomer where a party has been improperly described in the filing. *See Dupuis v. Smith Properties, Inc.*, 114 N.H. 625 (1974). In such cases where the proper party or parties have been served notice, but improperly described, the Court has allowed for amendments to add a party, even though the statutory limitations had passed. *Dupuis*, 114 N.H. at 629. It is well founded that in the case of a misnomer, the correction of the party relates back to the beginning of the action. *Roy v. Roy*, 101 N.H. 88, 92 (N.H. 1957). In a misnomer situation, the Court also considers the intent of the mistaken party, and where the intent to sue the correct party is apparent, amendments to the named parties are permitted. *Id.* Similarly, here it is apparent by the body of the appeal that the case deals entirely with Mr. Cole. *See*

generally Petition (May 26, 2017). Mr. Cole is mentioned constantly throughout the appeal, and the entire focus of the case is on him. *Id.*

The question to overturn the PAB's decision would provide Mr. Cole the direct remedy of receiving his job back with the State, and he received a copy of the appeal as stated in the certificate of service. Petition at 4, 14 (May 26, 2017). Further, the record at the PAB shows that he was the only appellant, and that the State understood he was the only appellant. [Certified Record (hereafter "CR") at 1, 10-13, 34, 39, 44, 64, 204, 310]. As a result, the intent of the appeal shows that Mr. Cole was in fact the appellant the whole time, and the amendment should be accepted and the case heard on its merits. *See* Petition at generally (May 26, 2017); *see* Pet. Mot. Amend Pet. Taken to its logical extreme, the State would have a misspelled plaintiff excluded from relief provided by this Honorable Court simply because of scrivener's error.

The State has further argued that other jurisdictions have found that adding a party to an appeal through amendment is prohibited, but those cases are distinguishable, and the State's position on the law is inaccurate. Furthermore, resolution of question of subject matter jurisdiction can be readily found within the State's own court rules and legislation. *See* RSA 541:6, *see* RSA 514:9. The State being reluctant to accept the answer, now seeks persuasive authority from outside jurisdictions in order to seek an unjust judgment regarding the case at hand. While such authority can sometimes be useful, it is the obligation of this Court to construe statutory intent by what this State's legislature intended, not by way of persuasive authorities from other jurisdictions. *See State v. Springer*, 133 N.H. 223, 225 (N.H. 1990).

In the case of *Torres v. Oakland Scavenger Co.*, the Court found that an appellant who was not named in an appeal could not be named after the time limitations had passed. *Torres v. Oakland Scavenger*, 487 U.S. 312, 317-18 (1988). However, in that case the appellant at issue was an intervener on an employment discrimination suit, and was one of sixteen additional intervening plaintiffs. *Torres*, 487 U.S. at 313. The appellant never sought to amend the appeal in accordance with the rules, and the appeals court left petitioner's name off of the order. *Id.* at 313, 317. In the appeal, Torres was never specifically mentioned, and his argument for inclusion was based largely on the appeal stating "Et. Al" in regard to the parties. *Id.* at 317-18.

Such a situation is distinct from the case at issue, because Cole was the only party at issue throughout all phases of the appeal at the Personnel Appeals Board, and on the motion for reconsideration. (CR at 1, 10-13, 34, 39, 44, 64, 204, 310). Although he was not expressly named in the list of parties in the initial appeal on May 26, 2017, the appeal discussed only issues pertaining directly to him and further sought remedy for Mr. Cole specifically. Petition generally (May 26, 2017). Furthermore, unlike the petitioner in *Torres* who failed to seek amendment within the rules, Mr. Cole sought to amend the appeal and be added as the petitioner prior to issuance of any order by the Court, and further did so in compliance with RSA 514:9, which permits substantive amendments at any time in the process. RSA 514:9; *see Torres*, 487 U.S. at 313, 17; Pet. Mot. Amend Pet.

Moreover, the State's reliance on *Torres* is misplaced as *Torres* has since been superseded, and the Federal Rules of Civil Procedure were rewritten because of the overly harsh results stemming from the *Torres* decision. *Retail Flooring Dealers of*

America, Inc. v. Beaulieu of America, LLC., 339 F.3d 1146, 1148 (9th Cir. 2003). In *Retail Flooring Dealers of America, Inc. v. Beaulieu of America* the court stated, “an appeal must not be dismissed ... for failure to name a party whose intent to appeal is otherwise clear from the notice”. *Retail Flooring Dealers of America, Inc.*, 339 F.3d at 1149. The court further reasoned that its reading of the rule “is consistent with the Supreme Court's statement that "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court.” *Id.*

Furthermore, this Court should accept Mr. Cole’s amended appeal on the merits because it would be consistent with RSA 514:9. RSA 514:9 states as follows:

514:9 Amendments. – Amendments in matters of substance may be permitted in any action, in any stage of the proceedings, upon such terms as the court shall deem just and reasonable, when it shall appear to the court that it is necessary for the prevention of injustice; but the rights of third persons shall not be affected thereby. Rev. Stat. Ann. 514:9.

Mr. Cole, through his attorneys, filed a motion to amend a petition to rectify a clerical error and to have Mr. Cole properly named as the appellant. *See* Pet. Mot. Amend Pet. Said amendment should be permitted as doing so would be just and reasonable and is necessary to prevent injustice. *See* RSA 514:9; *see* Pet. Mot. Amend Pet. Justice is served by hearing the Appeal on the merits because it raises important questions regarding Supreme Court precedent, and the outcome will affect Mr. Cole’s employment with the State, and the decision will further affect the rights of all state employees going forward. *See* RSA 514:9; Petition at 12-13 (May 26, 2017); Pet. Mot. Amend Pet. It is further

worth noting that the State has not argued or shown that the Court's acceptance of the amendment would harm or prejudice the State, or any other party in any way. *See* Appellee's Mot. Dismiss/Mot. Sum. Affirm. In accordance with this Court's rules, the underlying decision was attached to the appeal, which plainly shows that Cole was the plaintiff, and even in its own objection and motion to dismiss the State acknowledged that Cole is the rightful petitioner. *See* Appellee's Mot. Dismiss/Mot. Summ. Affirm. at 1; Appendix App. Pet. at 51, 81-82. As a result, the amended Appeal stating that Mr. Cole is the appellant should be granted, and the case should be heard on the merits. *See* RSA 514:9; Petition at 12-13 (May 26, 2017); Pet. Mot. Amend Pet.


VI. CONCLUSION

For the reasons set forth above, the Appellant requests this Honorable Court to hear this case on its merits, and to reverse the decision of the Personnel Appeals Board.

Respectfully Submitted,

James Cole
Through his counsel

Dated: March 28, 2018



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VII. CERTIFICATE OF SERVICE

In accordance with New Hampshire Supreme Court Rule 16 (7), the undersigned hereby certifies that an original and eight (8) copies of Appellant's Reply Brief have been hand delivered to the Clerk of the Supreme Court on this 28th day of March, 2018.

In accordance with New Hampshire Supreme Court Rule 16 (10), the undersigned hereby certifies that two (2) copies of Appellant's Reply Brief have been hand-delivered to Scott Sakowski, Esq., and one (1) copy hand-delivered to the PELRB.

In accordance with New Hampshire Supreme Court Rule 16 (10), the undersigned hereby requests that this matter be heard on oral argument and, further, that Gary Snyder, Esq. be designated as the attorney to argue its merits on behalf of the State Employees' Association of New Hampshire, SEIU Local 1984. Counsel respectfully requests fifteen (15) minutes for argument.

Dated: March 28, 2018



Gary Snyder, Esq.