

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

ELIAS MAKERE, FSA, MAAA)	<u>CASE NUMBER</u>
Appellant/Plaintiff)	24-11336-J
)	
v.)	
)	
ALLSTATE INSURANCE COMPANY)	<u>(LT)</u>
Appellee/Defendant)	3:20-cv-00905-MMH-LLL US District Court, Florida, Middle District

**APPELLANT’S MOTION FOR LEAVE
TO FILE HIS TRANSCRIPT ORDER FORM ‘OUT-OF-TIME’^{1/}**

Appellant, ELIAS MAKERE, on this 23rd day of July 2024, respectfully moves this Court to allow him to file his transcript order form today.

Key Points:

- A.) Points lower proceeding’s delays; timely order form;
- B.) Grounds equitable; no prejudice;

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Background: Appellant prepared his transcript order form
Problem: Clerk suggested that the form will be considered late
Request: Court allows Appellant to file his form today

Rule 10-1 | 11th Cir. R. | Ordering the Transcript – Duties...

"Appellant's written order for a transcript or certification that no transcript will be ordered... must be filed... within 14 days after filing the notice of appeal or after entry of an order disposing of the last timely motion of a type specified in FRAP 4(a)(4)."

Rule 42-1(b) | 11th Cir. R. | Dismissal of Appeals

"...when appellant fails to file a brief or other required papers within the time permitted... the clerk shall issue a notice... that upon expiration of 14 days... the appeal will be dismissed for want of prosecution if the default has not been remedied by filing the brief or other required papers and a motion to file documents out of time. Within that 14-day notice period a party in default must seek leave of the court, by appropriate motion, to file documents out of time or otherwise remedy the default."

Rule 4(a)(4) | Fed. R. App. P. | Appeal as of Right – When Taken

"(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure – and does so within the time allowed by those rules – the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(vi) for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59."

Abbreviations

4DCA – Florida's 4th District Court of Appeal
 FCHR – Florida Commission on Human Relations, The
 FS – Florida Statute
 LT – Lower Tribunal
 USCA11 – US Court of Appeals, 11th Circuit
 USFLMD – US District Court, Florida, Middle District

MOTION

I. Background | Administrative History

1. On April 10, 2019, Appellant sent the FCHR his charge of employment discrimination [against Appellee].
2. The state agency received it immediately; blessing it with a 2:35PM timestamp.

II. Background | Judicial History (Lower Tribunal)

3. On August 12, 2020, Appellant sued Appellee in federal court. Doing so under both federal (42 USC §1981) and state law (§760 FS). Laws that prohibit[ted] employment discrimination.
4. On February 8, 2021, USFLMD entered an order of partial dismissal (“That Order”). Therein, the lower court removed all three of Appellant’s state charges. Doing so, importantly, on the basis of administrative timeliness:

“In sum, the record establishes that the [State Agency] rendered timely “No Cause” determinations on [Appellant]’s Charges... As such, [Appellant] is administratively barred under section 760.11(7) of the Florida Statutes from pursuing his [state] claims here. [USFLMD] will grant the Motion as to Counts I-III of the Complaint and dismiss the [state] claims in their entirety.”

- Page 18, ‘That Order’

The LT’s calculation of timeliness, however, was based on a materially incorrect starting date.

5. On February 9, 2021 (ie, the following day), Appellant moved the LT to take judicial notice of the correct filing date.
6. Thirteen days later (ie, February 22, 2021), Appellant filed written objections to That Order. A set of objections which - on October 13, 2022 (ie, 20 months later) - the LT overruled.
7. Then, on March 26, 2024, the LT finally granted Appellant’s motion for judicial notice [of the correct filing date] (§5 *supra*). A decision that the LT took 36+ months to make. A decision, however, that also featured an entry of summary judgment (against Appellant). A decision, moreover, that claimed that the [correct] filing date never mattered (contrast with §4 *supra*).
8. On April 26, 2024, Appellant filed - in the LT - a *Motion for Relief from Judgment*. On that same day, he also filed a *Notice of Appeal*; thereby creating this appellate case (24-11336).
 - a. As of today’s date (ie, July 23, 2024), the LT still has not ruled on Appellant’s *Motion for Relief*. A timespan that has lasted 3 months.

III. Immediate Procedural History

9. On April 30, 2024, the Clerk of this Court (“Clerk”) directed Appellant to file his CIP (within 20 days).

10. On May 10, 2024, Appellant obliged (thereby meeting the deadline).

11. On May 28, 2024, Appellee filed its CIP. However, Appellee’s CIP was deficient (it did not include a Web-Based CIP).

a. Rule 26.1-1 11th Cir. R.

12. So, on May 31, 2024, the Clerk issued a 14-day notice. That notice, importantly, was directed to Appellee only (ie, not to Appellant). It read as follows (highlights added):

“NOTICE OF CERTIFICATE OF INTERESTED PERSONS (CIP) DEFICIENCY issued to Lauren C. Robertson for Allstate Insurance Company. You have failed to complete the Web-Based CIP on the Court's website. If you are an appellant or petitioner, pursuant to 11th Cir. Rules 26.1-5(c) and 42-1(b), this appeal will be dismissed without further notice upon the expiration of 14 days from the date of this notice unless you both remedy the default(s) AND file a motion to remedy the default(s).”

- Clerk Directive; 5/31/24; 24-11336 (USCA11)

Appellee, however, never complied with the Clerk’s directive.

13. Then - on July 5, 2024 - the Clerk entered default against Appellant. Doing so, for the [false/unnoticed] reason that Appellant had neither: (a) filed a *Transcript Order Form*; nor (b) submitted a *Certificate of No Transcript Need*.

14. On July 18, 2024 - and after subsequent communications - the Clerk reversed its default. Thereby reinstating this appeal.

15. Plus, on that same day (ie, July 18, 2024), the Clerk directed Appellant to:

a. submit either:

i. a completed Transcript Order Form; or

ii. a certificate stating no transcript will be ordered.

and

b. file a *Motion to File Documents Out of Time*.

16. Thus, this motion (accompanied by [the prescribed form](#)) ensued.

IV. Analysis of Pertinent Dates

17. The case below has been progressing at **a tremendously slow pace**. It began 47 months ago, and it featured a crucial decision that took the LT 36+ months to make (§7 *supra*).

a. The 47-month duration is telling, because it is much greater than the 18-month duration that the LT prescribed for this case.

b. The 36-month duration is also telling, because it should have lasted only 1 day (ie, roughly 0.10% of the time that it actually took).

i. The decision, pertinently, only asked the LT to acknowledge that April 10, 2019 was the date that

the State of Florida timestamped on Appellant’s charge of discrimination (§1-2 *supra*).

18. Appellant’s *Motion for Relief* (§8 *supra*) (which was filed under Rule 60 Fed. R. Civ. P.) satisfied Rule 4(a)(4) Fed. R. App. P. (highlights added):

“(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure – and does so within the time allowed by those rules – the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(vi) for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59.”

- Rule 4(a)(4)(A) Fed. R. App. P.

19. According to Local Rule 10-1 11th Cir. R., motions that fall under Rule 4(a)(4) Fed. R. App. P. toll the due date of the transcript order form (highlights added):

“Appellant’s written order for a transcript or certification that no transcript will be ordered... must be filed... within 14 days after filing the notice of appeal or after entry of an order disposing of the last timely motion of a type specified in FRAP 4(a)(4).”

- Local Rule 10-1, 11th Cir. R.

20. **Thus, Appellant’s transcript order form is not yet due.** The reason for this conclusion, of course, is because the LT has

yet to ‘enter an order disposing’ of Appellant’s Motion for Relief.

a. In fact, there is still a chance that the LT will hold a hearing (thereby producing [new] transcripts).

V. Arguments in Favor of Permitting an ‘Out-of-Time’ Submission

A. Decision on the Merits

21. Allowing Appellant to file his transcript order form ‘out-of-time’ will support a decision on-the-merits.^{1/} An axiom that the appellate courts have long extolled:

“It is axiomatic that Florida jurisprudence favors liberality in the area of setting aside defaults in order that parties may have their controversies decided on the merits.”

- Latin v. Italian, 596 So.2d 1174 (4DCA 1992)

B. Equitable Tolling

22. Equitable Tolling would also apply to an ‘out-of-time’ filing. In 2004, the US Supreme Court established that procedural deadlines are non-jurisdictional; thereby permitting equitable tolling (highlights added):

“We clarify, first, that the question before us – whether Scarborough is time barred by § 2412(d)(1)(B) from gaining the fee award authorized by § 2412(d)(1)(A) – does not concern the federal courts’ “subject-matter jurisdiction.”... The issue is not whether, but when, §§ 2412(d)(1)(A) and

(B) require a fee applicant to "allege that the position of the United States was not substantially justified." As we recently observed:"

"Courts, including this Court, ... have more than occasionally [mis]used the term 'jurisdictional' to describe emphatic time prescriptions in [claim processing] rules.... Classifying time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction' can be confounding. Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority."

"In short, § 2412(d)(1)(B) does not describe what "classes of cases," *id.*, at 455, the CAVC is competent to adjudicate; instead, the section relates only to postjudgment proceedings auxiliary to cases already within that court's adjudicatory authority. Accordingly, as [*Kontrick v. Ryan*, 540 US 443 (2004)] indicates, the provision's 30-day deadline for fee applications and its application-content specifications are not properly typed "jurisdictional."

- Scarborough v. Principi, 541 US 401 (2004)

In more explicit terms, the Scarborough court held that [the non-jurisdictional nature of the filing deadline tendered a conclusion that] a determination on-the-merits was the proper course of action (highlights added):

"We hold that a curative amendment is permissible and that Scarborough's fee application, as amended, qualifies for consideration and determination on the merits."

- Scarborough v. Principi, 541 US 401 (2004)

23. In fact, several courts in this circuit have applied equitable tolling to this specific 30-day deadline. See:

a. Cruz v. Berryhill, 347 F. Supp. 3d 1199 (USFLSD 2018);

b. Miller v. Berryhill, 8:17-cv-1470 (USFLMD 4/12/19)

24. Of course, this specific 30-day deadline (found in Scarborough) is analogous to the instant appeal:

"In view of the fact that the filing of [a Notice of Appeal] is not jurisdictional, but is analogous to statutes of limitation which are subject to equitable considerations"

- Castillo v. Dept. of Admin., 593 So.2d 1116 (2DCA 1992)

25. Importantly, this Court has long-held that equitable tolling should relieve a litigant from a [perceived] filing mishap:

"The doctrine of equitable tolling abates the harsh operation of the statute of limitations under certain circumstances in which barring a plaintiff's

potentially meritorious action would be unjust.”

- Justice v. US, 6 F.3d 1474 (11th Cir. 1993)

26. Altogether, this Court can apply equitable tolling to this matter; especially since it will not prejudice either party (see Scarborough at 422-423).

C. Timeliness (ie, Transcript Order Form is Not ‘Out-of-Time’)

27. Above all (ie, the best argument, perhaps), is the fact that Appellant’s transcript form is not yet due (§20 *supra*). Thus, the Clerk’s original default was erroneous (§13 *supra*). Erroneous defaults, of course, are invalid from the beginning (highlights added):

“We hold that the clerk's default was void ab initio because appellants served their answer and affirmative defenses before the clerk entered its default. Therefore, appellants were not required to raise the argument in the trial court that the default was void in order to preserve that point for appellate review... Accordingly, we reverse and remand with directions to the trial court to vacate the default and the final judgment entered thereon”

- Derosa v. Pugliese, 782 So.2d 1011 (4DCA 2011)

28. So - from beginning to end - this Court is well-positioned to:

- a. stave off default; and/or
- b. accept Appellant’s transcript order form [today].

VI. Nature of Relief Sought

29. Thus, Appellant asks this Court to accept his transcript order form on this day (ie, Tuesday, July 23, 2024). It can be found as an attachment to this motion. **[Attachment A]**

CONFERRAL

On July 23, 2024, Appellant asked Appellee (via email) whether it had any opposition to this motion. Hours later, Appellant followed up via phone. Appellee, however, neither answered Appellant’s phone call; nor replied to his messages (voicemail + email).

Nonetheless, given all-of-the-above, Appellant finds a compelling (ie, equitable tolling) and important (ie, decision-on-the-merits) reason for this motion. And he will update this Court if/when Appellee states its stance [to it].

CONCLUSION

WHEREFORE, Appellant respectfully asks this Court to accept his transcript order form [today].

Dated this 23rd day of July 2024.

Respectfully submitted,

/s/ Elias Makere

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Get **Booked Up** on Justice!

CERTIFICATE OF COMPLIANCE

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This document complies with the word limit of Rule 32(a)(7)(B)(i) Fed. R. App. P., because - excluding the parts of the document exempted by Rule 32(f) - this document contains 2,192 words.

or

~~This brief complies with the line limit prescribed by Rule 32(a)(7)(B)(i) Fed. R. App. P., because - excluding the parts of the document exempted by Rule 32(f) - this document contains [NNNN] lines of monospaced text.~~

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This document uses Courier New (12-Pt) Font; thereby complying with the typeface requirements of Rule 32(a)(5)(B) Fed. R. App. P.. This document also satisfies the type-style requirements of Rule 32(a)(6).

7/23/2024 /s/ Elias Makere
Date Elias Makere, FSA, MAAA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July 2024, I electronically filed the foregoing with the Clerk of Courts by using PACER; which will send a notice of electronic filing to the attached service list.

/s/ Elias Makere

Endnotes:

^{1/} Appellant used this title [for this motion] in order to satisfy the Clerk’s directive (see Clerk’s Notice {#11} at 1). Appellant, however, maintains that his transcript order form is not ‘out-of-time’ (please see the motion [itself] for an explanation).

Electronic Copy: (text-searchable)

TextBookDiscrimination.com/Files/CA11/24011336_GMOT_20240723_105227.pdf

TextBookDiscrimination.com/Allstate/Leave-Time

TextBookDiscrimination.com/Guides/Motions/Leave-Time

Link to Underlying Complaint ([HTML](#), [PDF](#), [Video](#))

HTML	TextBookDiscrimination.com/Allstate/Complaint-Full
PDF	TextBookDiscrimination.com/Files/USFLMD/20000905_AAC_20211104_230439.pdf
Video	https://youtu.be/e3mgBPHesXg

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CIP

United States Court of Appeals
Eleventh Circuit

24-11336-J
Makere v Allstate

{unchanged}

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Makere v Allstate, 24-11336-J

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Lower Tribunal:

Lambert, Laura

Magistrate

Howard, Marcia

District Judge

Parties:

Allstate Insurance Company

(NYSE: ALL)

Makere, Elias (FSA, MAAA)

Appellant

Appellant is not a subsidiary/affiliate of a publicly owned corporation. Pursuant to Rule 26.1-2 11th Cir. R., Appellant does not know of any other entities that have interest in this case. Appellant hereby certifies that this CIP is complete.

ATTACHMENT A

SHORT TITLE: Appellant’s Certification of No Needed
Transcript (Potentially)

DATE: 7/23/2024

DOC TYPE: Certificate

TRIBUNAL: US Circuit Court, 11th Circuit

CASE NO: 24-11336-J

CASE CAPTION: *Makere v. Allstate*

SIZE: 9 Pages

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

ELIAS MAKERE, FSA, MAAA)	<u>CASE NUMBER</u>
Appellant/Plaintiff)	24-11336-J
)	
v.)	
)	
ALLSTATE INSURANCE COMPANY)	<u>(LT)</u>
Appellee/Defendant)	3:20-cv-00905-MMH-LLL US District Court, Florida, Middle District

**APPELLANT’S NOTICE THAT THERE IS [PROBABLY] NO NEED
FOR A LOWER TRIBUNAL HEARING TRANSCRIPT^{1/}**

Appellant, ELIAS MAKERE, on this 23rd day of July 2024, hereby certifies that the Lower Tribunal will [probably] not need to gather/send any hearing transcript to this appellate court.^{1/} The Middle District of Florida has never held a hearing; recorded an interaction; or prepared a transcript.

Pursuant to Rule 11(a) Fed. R. App. P. (please also see Rule 10-1 11th Cir. R.), Appellant has attached the court-issued form to this document. It is also worth noting that Appellant has not filed a replica with the Lower Tribunal (please accord Rule 10(b)(1)(B) Fed. R. App. P.)^{2/}.

CONCLUSION

WHEREFORE, Appellant respectfully notifies this Court that it [probably] will not need to await any hearing transcript from the Lower Tribunal.^{1/}

Dated this 23rd day of July 2024.

Respectfully submitted,

/s/ Elias Makere
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I HEREBY CERTIFY that on this 23rd day of July 2024, I electronically filed the foregoing with the Clerk of Courts by using PACER; which will send a notice of electronic filing to the attached service list.

/s/ Elias Makere

Endnotes:

^{1/} Appellant inserted the word "probably", because there is a chance that the Lower Tribunal will hold a hearing on certain remaining matters (thereby producing [new] transcripts). Notably, on April 26, 2024 (ie, the same day Appellant filed this appeal), Appellant filed a *Motion for Relief* (under Rule 60 Fed. R. Civ. P.). That motion is still pending in the Lower Tribunal. Plus - according to Rule 4 Fed. R. App. P. - it has tolled this appellate proceeding.

^{2/} also see Clerk's Notice (11) at page 1).

CERTIFICATE OF COMPLIANCE

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7/23/2024

Date

/s/ Elias Makere

Elias Makere, FSA, MAAA

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CIP

United States Court of Appeals
Eleventh Circuit

24-11336-J
Makere v Allstate

{unchanged}

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Makere v Allstate, 24-11336-J

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Lower Tribunal:

Lambert, Laura

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Parties:

Allstate Insurance Company

(NYSE: ALL)

Makere, Elias (FSA, MAAA)

Appellant

Appellant is not a subsidiary/affiliate of a publicly owned corporation. Pursuant to Rule 26.1-2 11th Cir. R., Appellant does not know of any other entities that have interest in this case. Appellant hereby certifies that this CIP is complete.

TRANSCRIPT FORM

United States Court of Appeals
Eleventh Circuit

24-11336-J
Makere v Allstate

ELEVENTH CIRCUIT TRANSCRIPT ORDER FORM
Provide all required information and check the appropriate box(es)

PART I. Transcript Information

Within 14 days of the filing of the notice of appeal, the appellant must complete Part I and file this form with the District Court Clerk and the Court of Appeals Clerk for all cases. 11th Cir. R. 10-1.

Case Information:

Short Case Style: Elias Makere, FSA, MAAA vs Allstate Insurance Company
District Court No.: 3:20-cv-00905 Date Notice of Appeal Filed: 4/26/24
Court of Appeals No. (if available): 24-11336-J

Transcript Order Information:

No hearing No transcript is required for appeal purposes All necessary transcript(s) already on file
 I am ordering a transcript of the following proceedings:

HEARING DATE(S) / JUDGE/MAGISTRATE / COURT REPORTER NAME(S)

- Pre-Trial Proceedings _____
 Trial _____
 Sentence _____
 Plea _____
 Other _____

Criminal Appeals:

In a criminal appeal, if the appellant pleaded guilty and intends to raise an issue regarding the guilty plea, the record must include a transcript of the guilty plea colloquy, and if the appellant intends to raise an issue regarding the sentence, the record must include a transcript of the sentencing hearing. ***If such transcripts are not ordered, you must check the appropriate box(es) below:***

Transcript of Guilty Plea Colloquy

- A transcript of the guilty plea colloquy is already on file.
 A transcript of a guilty plea colloquy is not being ordered and is not already on file, and I certify that no issue regarding a guilty plea will be raised in a merits brief in this appeal.

Transcript of Sentencing Hearing

- A transcript of the sentencing hearing is already on file.
 A transcript of the sentencing hearing is not being ordered and is not already on file, and I certify that no issue regarding sentencing will be raised in a merits brief in this appeal.

Note: Counsel who seek leave to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), must ensure the record contains transcripts of all relevant proceedings. See 11th Cir. R. 27-1(a)(8).

Financial Arrangements:

I certify that I have made satisfactory arrangements with the Court Reporter(s) for paying the cost of the transcript(s).

Criminal Justice Act: My completed AUTH-24 for government payment of transcripts has been uploaded in eVoucher and is ready for submission to the magistrate judge or district judge [if appointed by the district court] or to the circuit judge [if ordered by or appointed by the circuit court]. [A transcript of the following proceedings will be provided *only if specifically authorized* in Item 13 on the AUTH-24: Voir Dire; Opening and Closing Statements of Prosecution and Defense; Prosecution Rebuttal; Jury Instructions.]

Ordering Counsel/Party: _____

Address: _____

E-mail: _____ Phone No.: _____

I certify that I have completed and filed Part I with the District Court Clerk and the Court of Appeals Clerk, served all parties, AND sent a copy to the appropriate Court Reporter(s) if ordering a transcript. 11th Cir. R. 10-1.

Date: _____ Signature: _____ Attorney for: _____

PART II. Court Reporter Acknowledgment

Within 14 days of receipt, the Court Reporter must complete this section, file this form with the District Court Clerk, and send a copy to the Court of Appeals Clerk and all parties. The transcript must be filed within 30 days of the date satisfactory arrangements for paying the cost of the transcript were made unless the Court Reporter obtains an extension of time to file the transcript.

Date Transcript Order received: _____

Satisfactory arrangements for paying the cost of the transcript were made on: _____

Satisfactory arrangements for paying the cost of the transcript have not been made.

No. of hearing days: _____

Estimated no. of transcript pages: _____

Estimated filing date: _____

Date: _____ Signature: _____ Phone No.: _____

PART III. Notification That Transcript Has Been Filed In District Court

On the date the transcript is filed in the district court, the Court Reporter must complete this section, file this form with the District Court Clerk, and send a copy to the Court of Appeals Clerk.

I certify that the transcript has been completed and filed with the district court on (date): _____

Date: _____ Signature: _____