ORIGINAL

IN SUPREME COURT OF OHIO

John Haight, et al.,	:	Supreme Court Case No. 2014-1241
	:	
Plaintiffs,	:	Appeal from the Montgomery County
v.	:	Court of Appeals, 2nd District
	:	
The Cheap Escape Company, et al.,	:	Appeal No. CA 25983
	:	
Defendants.	:	Trial No. 2012 CV 00946

PLAINTIFFS/APPELLEES' RESPONSE TO DEFENDANT KOSIR'S MOTION TO REALIGN

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The Court's Rules of Practice require a party to file a notice of appeal under either S.Ct.Prac.R. 7.01(A)(1) or (2) in order to appeal a lower court's decision. Defendant Mark Kosir has not filed a notice of appeal and, therefore, has waived his right to contest the Court of Appeals' decision at issue. As a result, Mr. Kosir should be dismissed and removed from the proceedings before this Court. Along with this Response, Appellees have filed a motion to dismiss Mr. Kosir from this appeal. Appellees incorporate that motion and its arguments here.

In an attempt to circumvent Rules 7.01(A)(1) and (2), Mr. Kosir filed a "motion for realignment." The motion asks the Court to put Mr. Kosir "on the same side" as Appellants Mr. and Mrs. Minchak, both of whom filed a notice of appeal. Regardless of what "side" Mr. Kosir is on, Mr. Kosir has no ability under the rules to appeal the Second District Court of Appeals' decision; Mr. Kosir never filed a notice of appeal. Mr. Kosir's motion should be denied as moot because he has no legitimate role in the proceedings before this Court.

I. Nature of the Case

This lawsuit is primarily an action to collect unpaid minimum wages due under Article II, Section 34a of the Ohio Constitution.

Plaintiffs/Appellees are former Sales Representatives for The Cheap Escape Company.[1] Appellees' main job duty was to sell advertising space in the company's coupon magazine and website. Cheap Escape paid Appellees commissions based on the ad space that Appellees sold. If Appellees did not make sufficient sales in a week, Cheap Escape paid Appellees less than minimum wage. Often times, this resulted in Cheap Escape not paying anything to Appellees.

Defendants/Appellants Robert and Joan Minchak ("Appellants") were principals and 50% owners of the company. Defendant Mark Kosir was Cheap Escape's president. Appellees sued all three people as employers under Article II, Section 34a of the Ohio Constitution.

II. Relevant Procedural Background

Appellees filed this action on February 6, 2012. At that time, Appellees only named Cheap Escape and Appellants as defendants.

On February 27, 2012, Appellants filed a motion to stay the trial court case and compel arbitration. The trial court denied Appellants' motion, and Appellants appealed. On January 25, 2013, the Court of Appeals upheld the trial court's decision to deny Appellants' motion.

On February 15, 2013, Appellants filed an Answer to Appellees' first amended complaint.

Four days later, Appellees moved for declaratory judgment regarding the applicability and constitutionality of O.R.C. 4111.14(B)(1). In short, Appellees argued that O.R.C. 4111.14(B)(1)'s definition of "employee" was more restrictive than that found in Article II, Section 34a of the Ohio Constitution. As a result, the statute must either be unconstitutional or

[1] Since filing this lawsuit, Cheap Escape has declared bankruptcy.

otherwise inapplicable to an action brought under Article II, Section 34a of the Ohio Constitution. That motion gives rise to the appeal currently before the Court.

On July 19, 2013, Plaintiffs filed a second Amended Complaint that named Mr. Kosir as an additional defendant. Although Mr. Kosir had plenty of time to move for leave to file a response to Appellees' outstanding motion for declaratory judgment, he did not.

On October 3, 2013, the trial court granted declaratory judgment against Appellees on the issue of whether O.R.C. 4111.14(B)(1) was applicable to this case. The trial court found that the statute was both constitutional and applicable to this action. Appellees timely appealed that decision.

Though Mr. Kosir had not responded to the original motion for declaratory judgment, he filed a brief in the Court of Appeals as an appellee. Mr. Kosir filed his brief after Appellants had filed a brief and essentially copied Appellants' brief. Mr. Kosir's attorneys attended the oral argument but allowed Appellants' attorneys to conduct the entirety of the argument.

On June 6, 2014, the Second District Court of Appeals reversed the trial court's decision and remanded the case. The Court of Appeals found that O.R.C. § 4111.14(B)(1) was not constitutional or applicable to this action.

On July 21, 2014, Appellants filed a notice of appeal and memorandum in support of jurisdiction. Appellants' notice of appeal was only on behalf of Robert and Joan Minchak.

On August 6, 2014, Appellees filed a memorandum in opposition of jurisdiction.

The next day, Mr. Kosir filed a single paragraph memorandum in support of jurisdiction that simply incorporated Appellants' memorandum. On the cover page of that memorandum,

Mr. Kosir listed himself as an "Defendant/Appellee." He had not been listed as "appellee" on any other party's filing.

At no time has Mr. Kosir filed a notice of appeal to this Court.

On October 30, 2014, Mr. Kosir filed a motion for "realignment." It appears that this motion is intended to allow Mr. Kosir to participate in the proceedings before this Court as an appellant.

III. Argument

This Court's Rules of Practice give a party two opportunities to appeal a decision to this Court. Mr. Kosir has not availed himself of either opportunity and has waived his ability to participate in this appeal. As a result, the Court should dismiss Mr. Kosir from these proceedings because he has no legitimate role here. [2] Because Mr. Kosir has admittedly not filed a notice of appeal, he now seeks to dodge that requirement by "realigning" himself with Appellants. There is no authority that allows him to do so.

"Realignment" generally applies to parties seeking to avoid or invoke diversity jurisdiction. *See State ex rel. Caszatt v. Gibson*, 2013-Ohio-213 ¶31 (11th Dist.). In those situations, parties may be realigned according to their interests for purposes of diversity jurisdiction. *Id.* This is not what Mr. Kosir seeks to do.

Instead, Mr. Kosir seeks to "realign" himself with Appellants to circumvent the Court's rules that require a party to file a notice of appeal. Mr. Kosir has never been on a different side of this case than Appellants, nor has anyone other than Mr. Kosir suggested that he was. Mr. Kosir simply failed to file a notice of appeal. Mr. Kosir points to no authority that would allow him to

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[2] *See* Appellees' Motion to Dismiss Defendant Kosir from this Appeal, incorporated herein.

now appeal the Court of Appeals' decision by "realigning" with a party that Mr. Kosir has always been aligned with.

As explained more fully in Appellees' motion to dismiss and remove Mr. Kosir from this appeal, Mr. Kosir has no legitimate role in this appeal. As such he should be removed from the proceedings and his motion to realign be denied as moot.

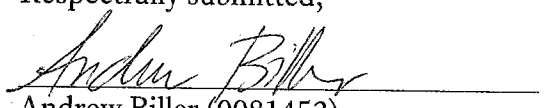
If the Court chooses not to dismiss Mr. Kosir outright, then his motion for realignment should still be denied as moot. Mr. Kosir cannot appeal a decision of a lower court without having filed a notice of appeal. He did not. As a result, "realigning" Mr. Kosir cannot now grant him the ability to argue to reverse the Court of Appeals' decision.

If, however, the Court elects to allow Mr. Kosir participate in this appeal and argue for reversal, then Appellees agree with Mr. Kosir that his interests are aligned with Appellants. Still, whether "realignment" is appropriate or what that would mean in this context is unclear. With respect to briefing, Appellees simply ask the Court to provide guidance as to when and how a non-appealing party may file a merit brief that urges reversal of a lower court's decision. With respect to oral argument, however, Appellees ask that Mr. Kosir not be granted any time allotted to Appellees because his interests are adverse to Appellees with respect to the judgment at issue and the case as a whole.

IV. Conclusion

As described above, Mr. Kosir's motion for realignment should be denied as moot. The "alignment" of Mr. Kosir has no effect on his failure to file a notice of appeal. Mr. Kosir should not be permitted to participate in these proceedings and argue for reversal of the Court of Appeals' decision.

Respectfully submitted,



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Certificate of Service

The undersigned hereby certifies that on the 3rd day of November, 2014, a copy of the foregoing was served upon the following and by regular mail.

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