

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, 2 nd District
	:	
The Cheap Escape Company, et al.,	:	Appeal No. CA 25983
	:	
Defendants.	:	Trial No. 2012 CV 00946

PLAINTIFFS/APPELLEES' MOTION TO DISMISS DEFENDANT KOSIR FROM THIS APPEAL

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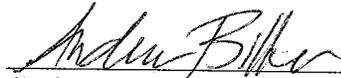
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PLAINTIFFS/APPELLEES' MOTION TO DISMISS DEFENDANT KOSIR FROM THIS APPEAL

Plaintiffs/Appellees ask the Court to dismiss Defendant Mark Kosir from this appeal. Mr. Kosir has not timely filed a notice of appeal as required by either S.Ct.Prac.R. 7.01(A)(1) or (2). As a result, Mr. Kosir waived his right to appeal or otherwise participate in the proceedings before this Court.

A memorandum in support is attached hereto.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT OF PLAINTIFFS/APPELLEES' MOTION TO DISMISS
DEFENDANT KOSIR FROM THIS APPEAL**

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 timely filed a notice of appeal under either rule and, therefore, has waived his right to contest the Court of Appeals decision at issue in this case. As a result, Mr. Kosir should be dismissed and removed from 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.

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

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 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.

With respect to jurisdictional appeals, a party has two options to appeal a decision to this Court. First, a party may file a notice of appeal within 45 days of the judgment being appealed. *See* S.Ct.Prac.R. 7.01(A)(1). Second, a party may file a notice of appeal or cross-appeal within ten

days of the first notice of appeal being filed. *See* S.Ct.Prac.R. 7.01(A)(2). Subsection (A)(2) distinguishes between cross-appeals and appeals. A cross-appeal is filed by a party *against* whom the original notice of appeal was filed. In contrast, an “appeal” under S.Ct.Prac.R. 7.01(A)(2) is from a party “in alignment” with the original, appealing party.

Here, Mr. Kosir has not filed a notice of appeal. In spite of that, Mr. Kosir seeks to appeal the Court of Appeals’ decision by filing a motion to “realign” the parties.² There is no option to circumvent the requirements in S.Ct.Prac.R. 7.01(A)(1) and (2) by filing a motion to realign.

Because Mr. Kosir has not filed a notice of appeal, he has no rights as an appellant in this case. “This court has consistently held that there is no right to an appeal from a decision of any tribunal except such as may be conferred by statute or by the Constitution, and that as a condition precedent to an appeal from a judgment of any court is the filing of a notice of appeal in that court within the time specified by the Appellate Procedure Act.” *Parton v. Weilnau*, 169 Ohio St. 145, 170, 158 N.E.2d 719 (1959). Mr. Kosir has waived his appeal rights in this case and cannot be considered an appellant, even if he shares a similar interest with Appellants. As a result, Mr. Kosir may not file a brief as an appellant in this case because S.Ct.Prac.R. 16.02(A)(1) authorizes only the *appellant* to file a merit brief.

Likewise, Mr. Kosir is not an appellee in this case because he has no interest in defending the judgment of the Court of Appeals; his brief in that court was nearly identical to Appellants’ brief. Even if Mr. Kosir was an “appellee,” an appellee who has not filed a notice of appeal may only argue to defend a lower court’s decision. *Parton v. Weilnau*, 169 Ohio St. 145, 170-71. (“An assignment of error by an appellee, where such appellee has not filed any notice of appeal from

² *See* Mr. Kosir’s Motion to Realign, filed October 30, 2014.

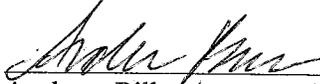
the judgment of the lower court, may be used by the appellee as a shield to protect the judgment of the lower court but may not be used by the appellee as a sword to destroy or modify the judgment.”) Advancing an argument to defend the Court of Appeals’ decision would directly contradict Mr. Kosir’s demonstrated interests in this case.

Because Mr. Kosir is not an appellant and his interests are opposed to defending the lower court’s decision in this case, the Court should dismiss and remove him from this appeal. He has no role here.

IV. Conclusion

Mr. Kosir did not file a notice of appeal, so he may not appeal the Court of Appeals’ decision. Because Mr. Kosir has no legitimate interest in arguing in favor of the decision, he should be dismissed from this appeal and his Motion to Realign be denied as moot.

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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