

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, EX REL. N.G.,)
)
 Relator/Appellee,)
)
 v.)
)
 CUYAHOGA COUNTY COURT OF)
 COMMON PLEAS)
 JUVENILE DIVISION, ET AL.,)
)
 Respondents/Appellees)
)
 -And-)
)
 S.F.,)
)
 Would-be Intervening)
 Respondent/Appellant)

CASE NO. 2015-0363

On Appeal from the Cuyahoga Court of Appeals, Eighth Appellate District Case No. CA-14-101425

MOTION TO DISMISS WITH MEMORANDUM IN SUPPORT

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MEMORANDUM

This is an appeal from judgments entered by the Eighth District Court of Appeals in an original action in prohibition. Relator/Appellee is the defendant in the underlying Cuyahoga County Court of Common Pleas Juvenile Division civil proceeding to which the prohibition action relates. The prohibition respondents were, appropriately, the Court of Common Pleas and the Hon. Alison Floyd, the judge assigned to the underlying proceeding. Would-be Intervening Respondent/Appellant (“Appellant”) was not a party to the prohibition action.

The Court of Appeals proceeded to hear and determine the cause on its merits. The court issued a writ of prohibition preventing respondents from unlawfully exercising jurisdiction. Judgment was entered against the respondent court and judge on September 30, 2014.

Appellant, the plaintiff in the underlying Juvenile Court Common Pleas proceeding, moved to intervene postjudgment in the prohibition action. Appellant also filed an emergency motion for relief from order. The Court of Appeals properly denied both motions. The order denying intervention and emergency relief was entered on January 14, 2015.

Appellant filed a notice of appeal to this Court on March 2, 2015 and failed to name two of the parties, to wit: The Court of Common Pleas of Cuyahoga County, Juvenile Division and the Hon. Alison Floyd. Instead, appellant only named Relator/Appellee as a party to the instant appeal.¹ Appellant’s merit brief was filed May 5, 2015. Relator/Appellee N.G. now files his motion to dismiss.

Appellant Lacks Standing.

Appellant’s sole participation in the prohibition proceeding in the Court of Appeals was the filing of an unsuccessful postjudgment motion for intervention and relief from judgment. In

¹ Upon information and belief, counsel for the Hon. Alison Floyd contacted counsel for Appellant regarding the omission the day after the 45 day period in which to appeal expired. Counsel for Hon. Alison Floyd and the Cuyahoga County Court of Common Pleas, Juvenile Division has entered an appearance in the instant matter by filing a stipulated extension of time.

this appeal, Appellant seeks to appeal not only the denial of her motion to intervene but also attempts to appeal the final judgment on the merits. This attempt to appeal the underlying judgment is not permitted by law.

This Court has already addressed this issue and stated:

*It is well-settled that “an appeal from the denial of a motion to intervene is limited solely to the issue of intervention.” State ex rel. Montgomery v. Columbus, 10th Dist. No 02AP-963, 2003-Ohio-2658, 2003 WL 21196837, ¶ 33; Tomrob, Inc. v. Cuyahoga Metro., Hous. Auth. (Sept. 11, 1997), 8th Dist. Nos. 71596 and 71688, 1997 WL 565971, *3 (appeal from a denial of a motion to intervene “is limited solely to the the issue of intervention, not the merits of the underlying appeal”); Fouche v. Denihan (1990), 66 Ohio App.3d 120, 126, 583 N.E. 2d 457; cf. Southside Community Dev. Corp. v. Levin, 116 Ohio St. 3d 1209, 2007-Ohio-6665, 878 N.E.2d 1048, ¶ 11 (“We hold that a person’s assertion that is has a legal right to be a party to the BTA appeal makes it a ‘party’ for one limited purpose: to see the court’s determination of whether the asserted right exists”).*

Sawicki v. Court of Common Pleas of Lucas County, et. Al, 121 Ohio St.3d 507, 2008-Ohio-1160, ¶18.

In *Sawicki*, Associated, a non-party, was unsuccessful in attempting to intervene in a procendendo case and appealed to this Court seeking to have both the denial of its motion to intervene as well as the underlying judgment on the merits reversed. This Court held that: “[a]s a nonparty, Associated lacks standing to challenge the court of appeals’ determination on the merits.” *Sawicki* at ¶18. This Court then dismissed that portion of Associated’s appeal that challenged the court of appeals’ granting of the writ of procendendo. *Sawicki* at ¶19.

S.F. now seeks to do the exact thing that this Court stated was not permissible. S.F.’s second and third propositions of law make it clear that she is improperly appealing the granting of the writ of prohibition. As stated above, as an unsuccessful would-be intervenor, Appellant can be a party to this appeal only “for one limited purpose,” that is, to challenge the denial of its effort to intervene. *Southside Community Development Corp. v. Levin*, 116 Ohio St.3d 1209,

2007-Ohio-6665, ¶11. Appellant has absolutely no standing to attack the merits judgment entered by the Court of Appeals.

Appellant's Defective Notice of Appeal

Appellant failed to name a party in her notice of appeal. The parties in the prohibition case, from which Appellant appeals, were:

1. N.G., the relator and
2. Cuyahoga County Court of Common Pleas, Juvenile Division and the Hon. Alison Floyd, the respondents.

However, Appellant only names Relator, N.G. in her Notice of Appeal.² Rule 6.01 and Rule 3.07 of the Rules of Practice of the Supreme Court of Ohio provide for the manner in which a Notice of Appeal as a matter of right must be filed.³ These rules provide the minimum requirements for the Notice of Appeal. At a minimum, it is required that a person bringing the appeal actually name the parties to the judgment from which they are appealing. Appellant S.F. has failed to meet even this most basic of requirements.

This Court reviews defects in the notice of appeal under a substantial compliance standard. *Spencer v. Freight Handlers*, 131 Ohio St.3d 316; 2010-Ohio-2138 ¶14 following *Fisher v. Mayfield*, 30 Ohio St.3d 8, 505 N.E.2d 957 (1987) paragraph one of the syllabus.

However, the failure to name one of the two parties in the notice of appeal fails to comport with even the most loosened of standards. It is anticipated that Appellant will argue that, even though she omitted a party in the notice of appeal, she nonetheless served the omitted party upon learning of the omission. This would not cure the defect as Appellant waited until the

² While counsel for the unnamed parties, Cuyahoga County Court of Common Pleas, Juvenile Division and the Hon. Alison Floyd has made an appearance, the defect is still present.

³ S.Ct.Prac.R. 3.07 states: (B) Name of appellees. The cover page of a notice of appeal shall also provide the name of each appellee in the appeal before the Supreme Court.

45th day in which to file her Notice of Appeal and any service past that date would not constitute a properly filed Notice of Appeal.⁴

S.Ct.Pract.R. 3.11 provides that all documents presented for filing be served on all parties and contain a certificate of service which states the manner of service and identifies all parties served.⁵ When taken together, the rules provide that service shall be perfected **before** the filing of the certificate of service. Otherwise, the requirement of a certificate of service would be rendered meaningless.

Appellant's certificate of service does not contain any mention of service on respondents Hon. Alison Floyd and the Cuyahoga County Court of Common Pleas, Juvenile Division, because Appellant did not serve said respondents prior to filing the Notice of Appeal. Any attempt by Appellant to serve respondents past the 45 day deadline and then amend her notice of appeal, would be untimely. S.Ct.Prac.R. 3.13(B)(1).

For the reasons stated above, this Court lacks jurisdiction of Appellant's purported appeal. Appellant's Notice of Appeal was fatally defective. Additionally, Appellant seeks review of the merits of the decision by the Court of Appeals granting the writ of prohibition, and, as a non-party, Appellant lacks standing to appeal the order granting the writ of prohibition. Accordingly, Appellant's appeal should be dismissed in its entirety, or in the alternative, dismissed to the extent it seeks review of the judgment on the merits.

⁴ S.Ct.Prac.R. 3.13(B)(1) provides: The revised document shall be filed within the time permitted by these rules for filing the original document...

⁵ S.Ct.Prac.R. 3.11 states in pertinent part: (B)(1)(a) ... [W]hen a party ... files any document with the Clerk of the Supreme court, that party ... shall also serve a copy of the document on all parties to the case. (D)(1)(a) ... [A]ll documents presented for filing with the Clerk shall contain a certificate of service. The certificate of service shall state the date an manner of service and identify the names of the persons served ...

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to S.Ct.Prac.R. 3.11(B)(1), a true copy of the foregoing Motion to Dismiss with Memorandum in support was served this 29th Day of May 2015 by email upon:

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