

IN THE SUPREME COURT OF OHIO

19-0730

MARY A. PETERSON,

APPELLEE

V.

MATTHEW V. JOHNSON,

APPELLANT

On Appeal from the Erie County Court
of Appeals, Sixth Appellate District

Court of Appeals

Case No. CA-16-104579

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT MATTHEW JOHNSON

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FILED
MAY 28 2019
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This appeal is of public interest and of great general interest to anyone seeking to exercise his or her right to pursue an appeal of a trial court decision in the State of Ohio. The issue at the heart of this appeal is the substantial constitutional question regarding the limits of an appellate court's discretion to dismiss a litigant's appeal, and at what point the exercise of that discretion becomes a denial of the litigant's constitutional right to appeal. It presents the Ohio Supreme Court with the opportunity to clarify its prior guidance regarding an exercise of appellate court discretion to dismiss an appeal *sua sponte* under App.R. 3(A) so as to address intra-district conflicts in past Sixth District Court of Appeals cases involving App.R.3(A) dismissals, and conflicts between districts regarding App.R. 3(A) dismissals.

A. *The sua sponte dismissal of the appeal in this case constituted an arbitrary and unwarranted denial of the right to appeal under the Ohio Constitution.*

In this case, Appellant's appeal was dismissed on the day before the 30 day window closed for refiling his appeal simply because the first line of the caption on his Notice of Appeal read "In the Sixth District Court of Appeals" rather than "In the Court of Common Pleas, Erie County, Ohio." *See: Appx "B"*. The body of the appeal specifically stated that the appeal was being taken from the Erie County Court of Common Pleas and that the appeal was being taken to the Sixth District Court of Appeals, the case title was the same as it was in the trial court proceedings, the correct case number was referenced, and the Notice of Appeal was filed with the trial court clerk of courts in the correct trial court case and a new court of appeals case was opened. *id, see also: Appx "B"*.

Appellant would argue that the breadth of the Sixth District's somewhat arbitrary, and

often excessively harsh, exercise of its discretion to dismiss appeals under App.R. 3(A) has already been demonstrated through the Sixth District's various appellate decisions. Not only is there a marked difference between how App.R. 3(A) matters are resolved based on the type of case being appealed, but the reasoning behind the dismissals does not seem to be tied to any objective criteria such as whether anything less than dismissal would prejudice the other parties in the action, whether the defect in the notice or its filing prevented adequate notice of the appeal to the parties.

B. *The refusal of the Sixth District to follow this Court's precedent in Transamerica has created a disparity and intra-district conflict between Sixth District decisions.*

In past cases, the Sixth District Court of Appeals has not shown a complete refusal to consider alternatives other than dismissal of an appeal due to a defect under App.R. 3. In *Horen v. Summit Homes*, the notice of appeal referenced four decisions from which the appeal was being taken but had eight decisions attached. In rejecting the Appellee's argument that the appeal should be dismissed as to the four decisions which were not referenced in the notice of appeal, the Sixth District Court of Appeals reasoned that attaching a copy of the other four orders to the notice was sufficient to "put [Appellee] on notice that they intend to appeal all of those orders." *Horen v. Summit Homes*, 2004-Ohio-2218, ¶18-¶20. Similarly, the Sixth District Court of Appeals has also allowed the amendment of a notice of appeal after passage of the 30 day window for filing the appeal so as to add an additional party to the notice. *National City Bank v. Victor Building Company, Inc.* (March 24, 2000), App. No. L-99-1311, unreported.

While the Sixth District has not outright refused to consider other, ways of addressing a defect under App.R. 3 short of dismissal of the appeal, the Sixth District has not been consistent in exercising its discretion in these matters. For example, in an appeal brought by a biological

mother from a decision terminating her parental rights for two of her children, referred to as "JJ" and "BJ", the Sixth District Court of Appeals dismissed the appeal as to BJ reasoning that, although the two cases were tried and decided together, and both children were referenced in the notice of appeal, the mother only filed the notice of appeal under the case number allocated to JJ and failed to also file her appeal under the case number allocated to BJ. *In re J.J.* 2018-Ohio-3819, ¶3.

Although the Sixth District Court seemed to rely upon the lack of a consolidation of case numbers for its dismissal in *In re J.J.*, it addressed the issue entirely differently in an appeal of two separate juvenile delinquency cases, one involving a burglary charge and the other involving weapons charges, but both involving the same juvenile. *In re B.H.*, 2015-Ohio-2296 at ¶13. In *In re B.H.*, the Sixth District Court of Appeals recognized that "... separate judgments were entered under their respective case numbers" but concluded that "[r]ather than a dismissal of the appeal related to the burglary case ... we will consider the appeal as covering both judgments" and proceeded to consider both cases in the appeal.

One might see the difference in treatment between *In re J.J.* and *In re B.H.* and say that the determination of whether separate case numbers requires multiple notices of appeal would differ between juvenile custody where the differing case numbers represent children and juvenile delinquency where the same child is involved and the differing case numbers represent criminal offenses. However, the Sixth District's rationale in *In re B.H.*, where the case numbers represented different criminal charges, also differs from the Sixth's District's treatment of other cases where charges were brought under separate case numbers.

In *State v. Ferbrache*, for example, the Appellant was charged in two separate

indictments, one alleging felonious assault and marijuana possession and the second of which alleged illegal marijuana cultivation and possession of chemicals to manufacture a controlled substance. *State v. Ferbrache, 2007-Ohio-746*. Although indicted separately, all four charges were pled together, and addressed in the same sentencing order, and appealed through the same notice of appeal by the pro se appellant; However, instead of proceeding to consider the full sentencing order, the Sixth District noted that "[a]lthough heard together in the trial court, the cases arising from the separate indictments were never consolidated" as a basis for summarily dismissing the appeal as to the first of the two indictments. *id* at ¶4, footnote 1. Since the trial court's sentencing order allocated four years for each offense charged, the dismissal of the appeal as to the first of the two indictments effectively removed eight years of the sentence from consideration in the appeal. *id*.

C. *The refusal of the Sixth District to follow this Court's precedent in Transamerica has created a disparity and conflict between districts.*

The somewhat arbitrary application of discretion in App.R. 3(A) dismissals by some districts such as the Sixth District Court of Appeals puts these decisions from such districts at odds with decisions on similar matter in other jurisdictions to the extent that the question of whether a defect in a notice of appeal will result in an outright dismissal of your appeal, refusal to consider major aspects of your appeal, or no real consequence at all will depend largely on where your case was heard in Ohio.

Compare, for example, the treatment of App.R. 3 defects in the foregoing Sixth District decisions to how comparable issues have been resolved in the Second District Court of Appeals. In *Avery v. Avery*, the Second District Court of Appeals denied the Appellant's request for dismissal of a pleading entitled "Post Decree Cross Appeal Motion to Modify Final Judgment

and Decree of Divorce" where it had been filed and served on the Appellant within the time frame for filing a cross-appeal and was therefore deemed "sufficient to constitute a timely filed notice of cross-appeal pursuant to Ohio App.R. 3(A) and *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, syllabus." *Avery v. Avery*, 2002-Ohio-1188, at ¶3-¶4.

The Second Districts does not just differ from the Sixth District in these matters is not limited to what defects constitute grounds for dismissal of the appeal, however, but also as to whether it can go further, pursuant to App.R. 3(F), in *sua sponte* amending defective notices so as to fix the errors. In the case of *State v. Strodes*, the Second District Court of Appeals went even further in interpreting App.R. 3(F) as allowing the Second District to *sua sponte* correct a Notice of Appeal that was filed in the wrong case so as to reflect the correct trial court case number. *State v. Strodes*, 2002-Ohio-4200, at ¶3. In *NBD Mtge. Co. v. Marzocco*, the Second District once again invoked the amendment provision of App.R. 3(F) to include an additional entry which was not included or referenced in the original notice of appeal. *NBD Mtge. Co. v. Marzocco*, 2001-Ohio-1705 at ¶12.

Although the Second District Court of Appeals is used as an example to show the stark difference between the two jurisdictions in how they approach the App.R. 3(A) dismissal issue, other districts tend to fall somewhere in the middle. The Eighth District Court of Appeals, for example, has held that "App.R. 3 must be construed in light of the purpose of a notice of appeal, which is to notify appellees of the appeal and advise them of 'just what appellants ... [are] undertaking to appeal from.'" *Parks v. Baltimore & Ohio RR* (1991), 77 Ohio App.3d 426, 428, 602 N.E.2d 674, citing *Maritime Manufacturers, Inc. v. Hi-Skipper Marina* (1982), 70 Ohio St.2d 257, 258-259, 436 N.E.2d 1034. The Fifth District Court of Appeals has followed the

Eighth District's lead to an extent, but has gone further in stressing its continued reliance on *Schloss v. McGinness* which specifically requires that "an appellate court need not review the merits of the judgment or order, unless it is designated or otherwise referenced in the notice of appeal." *In re Allen*, 2004-Ohio-2911, ¶23-24 ; citing *Schloss v. McGinness* (1984), 16 Ohio App.3d 96, 97-98, 474 N.E.2d 666.

4. *There is Public and Great Interest in further guidance and limitations on the exercise of discretionary dismissals under App.R. 3(A)*

The Ohio Supreme Court has provided a clear and concise set of factors to consider prior to the summary dismissal of an appeal under App.R. 3(A). Yet, the clear inconsistency on this issue around the state, and even within the Sixth District itself, creates confusion and uncertainty for litigants who are simply trying to exercise their right under the Ohio Constitution to appeal an adverse trial court determination. Neither counsel nor litigants in the Sixth District know what will happen if there is a defect in the body or filing of the notice of appeal or what precedent from the Sixth District to argue. Litigants in other districts are treated differently than litigants in the Sixth District.

This Court is in the best position to resolve these questions and provide additional guidance to the appellate courts and litigants through its acceptance of this case. Further, a large number of future litigants, including pro se litigants, in cases ranging from appeals of minor issues to appeals of criminal and termination of custody issues, will benefit from the Court's consideration of this matter.

STATEMENT OF FACTS AND THE CASE

Appellant and Appellee were divorced on January 7, 2011, and had a daughter from the marriage who will be referred to as M.E.J. Pursuant to the terms of the parties' divorce, Appellee was designated as M.E.J.'s residential parent and legal custodian with the parties sharing time with M.E.J.

The parenting time allocation was modified once on March 21, 2014, but the immediate litigation didn't really arise until Appellant filed a Motion to Modify Parental Rights and Responsibilities on March 18, 2016, due to a host of concerns Appellant had regarding Appellee's mental health and the stability of her living environment. Appellant's motion was set for a hearing on March 24, 2016, but was resolved through an agreed entry providing Appellant with "temporary" custody of M.E.J. and Appellee having parenting time supervised by her parents. *See: Appx "C", at p. 2.*

The temporary order was supposed to be in place until April 30, 2017; However, on or about April 3, 2017, Appellee was hospitalized after cutting herself in the neck with a knife and ingesting a "home remedy drain cleaner" both of which Appellee indicated were accidents. *See: Appx "C", at p. 2, par. 13.* During this time period, Appellee obtained a civil protection order against her then husband alleging that she had to flee with M.E.J. from their home, and that her husband followed them to her parent's residence across the street and choked her. *id at par. 14.* Appellee never told Appellant about these incidents nor the fact that M.E.J. was a protected party under an active civil protection order. *id.*

On August 9, 2017, the trial court issued a judgment entry which, again, named Appellant as "temporary" custodial parent of M.E.J. and her residential parent for school placement

purposes subject to limited supervised parenting time by Appellee. *id at p. 1, par. 6.*

As a result of the foregoing, M.E.J. lived almost solely with Appellant from March 18, 2016, through the fall of 2018.

In late July of 2017, Appellant had filed a "Second Amended Motion" seeking reallocation of parental rights and responsibilities hoping to provide some finality to the litigation and stability for M.E.J. which would finally come for a trial from December 10th through the 14th of 2018. During the course of the three years of litigation in this matter, the guardian ad litem had been replaced by a second guardian ad litem who was granted leave to withdraw and subsequently replaced, not by a guardian ad litem but by an attorney for the child. Since the guardian ad litem had not been re-appointed, there was no current investigation or report by the guardian ad litem nor a certification from the guardian ad litem that there was a conflict between the guardian's assessment of M.E.J.'s best interests and M.E.J.'s wishes. Yet, rather than re-appoint the guardian ad litem to update her report, the trial court appointed a separate attorney for M.E.J. and the case proceeded with no guardian ad litem whatsoever.

In its decision, the trial court judge largely ignored the safety concerns regarding Appellee's stability and mental health, ignored the fact that the minor child had adjusted well to Appellant's home, school, and community, and proceeded to rely heavily on the purported wishes of the minor child even in the absence of a current guardian ad litem's investigation or report as to the best interests of the minor child.

The Decision of March 13, 2019, was appealed to the Sixth District Court of Appeals through the filing of a Notice of Appeal with the Erie County Clerk of Courts on March 25, 2019, in the trial court case number, 2010-DR-0008. Although the Notice of Appeal fulfilled all

the requirements of Ohio App.R. 3(A)&(D), the very first line of the caption stated "In the Sixth District Court of Appeals" rather than "In the Court of Common Pleas of Erie County, Ohio" and so the Erie County Clerk of Courts, which handles both filing for the Erie County Court of Common Pleas and the Sixth District Court of Appeals for Erie County, also filed the Notice of Appeal under newly opened appellate case number E-19-0018. *See: Appx "B"*. It is notable, however, that the Notice of Appeal was never stricken from the trial court case docket and remains filed in the appropriate trial court case. *See: Appx "D"*.

Based solely on the mistake in the first line of the caption of the notice of appeal, the Sixth District Court of Appeals waited seventeen (17) days before dismissing the appeal *sua sponte*. The dismissal was filed on April 11, 2019, and mailed out to the parties on April 12, 2019, the day before the 30 day window closed for re-filing the notice of appeal.

Although mailed out by the Clerk's office on April 12, 2019, Appellant did not receive the dismissal entry until much later. A Motion for Reconsideration was filed with the Sixth District Court of Appeals, and is still pending, but it was filed out-of-rule and Appellant's request for its consideration out-of-rule has not yet been ruled upon by the court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I:

Where the body of a Notice of Appeal correctly identifies the court from which an appeal is taken, the court to which the appeal is taken, the identity of the appellant, the judgment entry being appealed, and is filed in the correct trial court case, the captioning of a Notice of Appeal in the appellate court instead of the trial court is not a defect warranting dismissal of the appeal under App.R. 3(A).

The Ohio Constitution provides that the Ohio Supreme Court "shall have appellate jurisdiction in ... [c]ases involving questions arising under the constitution of the United States or of this state." *Ohio Constitution, Article IV, Section (2)(B)(2)(a)(iii)*. Litigants in Ohio are

entitled to an appeal from a trial court judgment when a notice of appeal is filed within the time allowed. App.R. 3(A). *Rothman v. Rothman*, 124 Ohio St.3d 109, 2009-Ohio-6410, ¶ 4, citing: *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d. 80, 84-85, 523 N.E.2d 851. The right to an appeal "is a property interest and a litigant may not be deprived of that interest without due process of law." *Id.* citing *Atkinson, supra*, at paragraph one of the syllabus.

In determining whether the dismissal of an action or appeal was appropriate, the Ohio Supreme Court "has repeatedly emphasized the fundamental tenet that courts should strive to decide cases on their merits. " *Natl. Mut. Ins. Co. v. Papenhagen* (1987), 30 OBR 21, 505 N.E.2d 980, citing: *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 23 O.O. 3d 210, 431 N.E.2d 644; *Fisher v. Mayfield* (1987), 30 Ohio St.3d 8, 30 OBR 16, 505 N.E.2d 975. In stressing the importance of deciding cases on their merits, the Court in *Papenhagen* explained that it is "not unmindful of the important function of local appellate rules in ensuring the prompt, orderly and effective administration of justice ..." but that it is "... also aware that justice is ultimately best served by an attitude of judicial tolerance toward minor errors, made in good faith, which pose no danger of prejudice to the opposing party or to the court's essential functions." *State ex rel. Lapp Roofing & Sheet Metal Co., Inc. v. Indus. Comm.*, 117 Ohio St.3d 179, 2008-Ohio-850, at ¶ 11-12, citing *Natl. Mut. Ins. Co. v. Papenhagen, supra*.

The appropriate sanction under AppR. 3(A) is within the discretion of the appellate court, and may include dismissal of the appeal. *See: App.R. 3(A), supra*. However, an appellate court "... abuses its discretion by dismissing the appeal when the mistake was made in good faith, no prejudice accrued as a result, dismissal constituted a disproportionate sanction, the client was punished for the fault of his counsel and the dismissal frustrated the overriding objective of

deciding cases on their merits." *Transamerica Insurance Company v. Nolan*, 72 Ohio St.3d 320 (1995).

In the immediate case, The Notice of Appeal was filed with the Erie County Clerk of Courts on March 25, 2019, in well within the 30 day time frame for filing an appeal from the trial court's decision. *See: Appx "B"*. This Notice of Appeal fulfilled all of the requirements of Ohio App. R. 3(A), (D) & (G). The Notice of Appeal contained the same title of "Mary Peterson vs. Matthew Johnson", correctly designated Ms. Peterson as Plaintiff/Appellee and Mr. Johnson as Defendant/Appellant, and contained in it's caption and body the trial court case number of "2010-DR-0008" from which the appeal was being taken. *See: Appx "B"*.

As required by App.R. 3(D), the Notice of Appeal also stated the Court to which the appeal was being taken and designated the judgment from which the appeal was being taken stating specifically, and accurately, that Appellant "hereby appeals to the Ohio Sixth District Court of Appeals from a decision of the Erie County Common Pleas Court dated March 13, 2019." *id.* Also filed were the request for transcripts and an appropriate Docketing Statement pursuant to Ohio App.R. 3(G). *See: Appx "D"*.

There was one mistake in the Notice of Appeal which was inadvertent and made entirely in good faith. The Appellant's trial counsel filed the notice of appeal and in the top line of the caption mistakenly stated "In the Sixth Circuit Court of Appeals" rather than "In the Court of Common Pleas of Erie County, Ohio". *See: Appx "B"*.

It's clear that the mistake was in good faith as anyone *intending* to mislead an opposing party, or deny an opposing party his or her right to notice of the appeal would choose something other than reiterating that the matter was being appealed to "The Sixth Circuit Court of Appeals."

Although referencing a different case number, failing to properly designate the address for the Appellee's trial counsel, referencing the wrong entry, or providing misleading language regarding the substantive matters being appealed, could all arguably be intended to "mislead" or "trick" an appellee, the referencing of "In The Sixth Circuit Court of Appeals" in the top line of the caption could only serve to reinforce the notice being provided that the decision is being appealed.

Additionally, no prejudice to Appellee had resulted from the mistake. Appellee's trial counsel is also her appellate counsel and nothing was filed, nor any communications received, to indicate that there was any confusion caused by the Notice of Appeal. Nor should there be since the body of the Notice of Appeal specifically stated the correct court from which the appeal was being taken, the correct court to which the appeal was being taken, and it was filed in the correct trial court case.

Given that the Notice of Appeal fulfilled all of the requirements of App.R. 3(A), (D), and (G), and the Sixth Circuit has shown a willingness in other cases to allow amendment of a notice of appeal beyond the 30 day window to add parties, to overlook the failure to specify all of the decisions from which the appeal is being taken, to overlook the failure to include trial court case numbers in a notice of appeal, it seems clear that the dismissal of this appeal based on an inadvertent mistake in the very top line of the caption of the Notice of Appeal constituted a disproportionate sanction, that the Appellant was punished for the mistake of his counsel, and that the dismissal frustrated the overriding objective of deciding cases on their merits.

CONCLUSION

For the foregoing reasons, Appellant would respectfully request that the Supreme Court of Ohio accept this case for consideration, reverse the Sixth District Court of Appeals Opinion filed April 11, 2019, and remand the matter for consideration of the appeal on its substantive merits.

Respectfully submitted,



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Attorney for Appellant, Matthew Johnson

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a true and accurate copy of the foregoing Jurisdictional Memorandum has been served by electronic transmission (email) on this upon 28th day of May, 2019, upon the following counsel:

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Attorney for Minor Child:

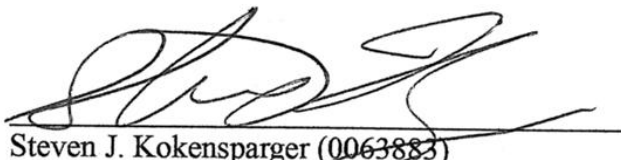
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Steven J. Kokensparger (0063883)

Attorney for Appellant

APPENDIX A

Opinion of the Sixth District Court of Appeals
(April 11, 2019)

FILED
COURT OF APPEALS
ERIE COUNTY, OHIO
2019 APR 11 AM 11:03
LUVADA S. WILSON
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Mary A. Peterson

Court of Appeals No. E-19-018

Appellee

Trial Court No. 2010-DR-0008

v.

Matthew V. Johnson

DECISION AND JUDGMENT

Appellant

Decided: APR 11 2019

This appeal is before the court sua sponte. On March 25, 2019, appellant filed a notice of appeal. Appellant captioned and filed the notice of appeal "In the Sixth District Court of Appeals, Erie County, Ohio." Notices of appeal should not be captioned or filed in the court of appeals; they must be captioned and filed in the trial court. App.R. 3(A). See *Newton v. Republic Steel Corp.*, 25 Ohio St.2d 42, 266 N.E.2d 564 (1971). Appellant filed the notice of appeal in the wrong court and, therefore, this court lacks jurisdiction to address the appeal.

J42/318
4/12/19

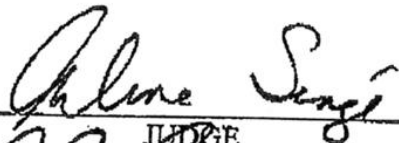
The notice of appeal is ordered stricken and this appeal is dismissed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

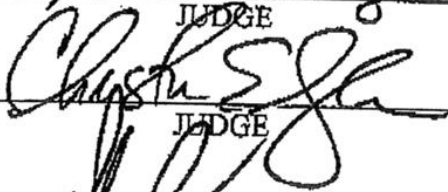
Arlene Singer, J.

Christine E. Mayle, P.J.

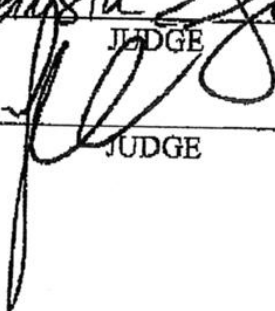
Gene A. Zmuda, J.
CONCUR.



JUDGE



JUDGE



JUDGE

APPENDIX B

Notice of Appeal to the Sixth District Court of Appeals
(March 25, 2019)

FILED
COURT OF APPEALS
ERIE COUNTY, OHIO

2019 MAR 25 PM 2:29 THE SIXTH DISTRICT COURT OF APPEALS
ERIE COUNTY, OHIO

LUVADA S. WILSON
CLERK OF COURTS
MARY A. PETERSON,

PLAINTIFF/APPELLEE,

v.

MATTHEW V. JOHNSON,

DEFENDANT/APPELLANT.

CASE NO: 2010-DR-0008
APPEALS NO: 19-07

JUDGE:

E-19-0018

Filed in Error
FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO

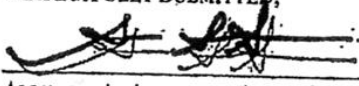
2019 MAR 25 PM 2:29

LUVADA S. WILSON
CLERK OF COURTS

NOTICE OF APPEAL

NOW COMES, DEFENDANT, MATTHEW JOHNSON BY AND THROUGH HIS ATTORNEY AMANDA A. ANDREWS, AND HEREBY APPEALS TO THE OHIO SIXTH DISTRICT COURT OF APPEALS FROM A DECISION OF THE ERIE COUNTY COMMON PLEAS COURT DATED MARCH 13, 2019. A COPY OF THIS DECISION IS ATTACHED HERETO AND INCORPORATED BY REFERENCE HEREIN AS EXHIBIT A.

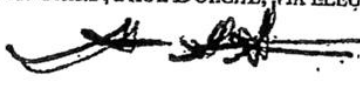
RESPECTFULLY SUBMITTED,


AMANDA A. ANDREWS (00088814)
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FAX: 800.715.2850
AMANDA@AMANDAANDREWSLAW.COM

DATED: MARCH 22, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE FOREGOING HAS BEEN SERVED UPON COUNSEL FOR THE APPELLEE, BRENT ENGLISH AND ATTORNEY FOR THE MINOR CHILD, PAUL DOLCHE, VIA ELECTRONIC MAIL, THIS 22ND DAY OF MARCH 2019.


AMANDA A. ANDREWS (00088814)
ATTORNEY FOR DEFENDANT

APPENDIX C

Judgment Entry of the Erie County Court of Common Pleas, Domestic Relations Division
(March 13, 2019)

ORIGINAL

IN THE COURT OF COMMON PLEAS
ERIE COUNTY, OHIO
DOMESTIC RELATIONS DIVISION

FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO
2019 MAR 13 PM 2:31
LUVADA S. WILSON
CLERK OF COURTS

MARY A. PETERSON
PLAINTIFF

CASE NO. 2010-DR-0008

VS.

JUDGE DEBRA L. BOROS
(BY ASSIGNMENT)

MATTHEW V. JOHNSON
DEFENDANT

JUDGMENT ENTRY

This matter came on for hearing before the Court December 10-14, 2018 on Defendant, Matthew V. Johnson's Second Amended Motion to Reallocate Parental Rights and Responsibilities. Present for the hearing were Plaintiff, Mary Peterson, Counsel for Plaintiff, Brent English, Defendant, Matthew Johnson, Counsel for Defendant, Amanda Andrews and Counsel for the Minor Child M.E.J., Paul Dolce. Prior to the hearing the Court had an in-camera hearing with the minor child, M.E.J., age 11 with her Attorney present, but not participating in the hearing.

Based upon the evidence presented, a review of the Court file and the in-camera with the minor child, the Court finds as follows:

1. Plaintiff and Defendant were divorced on January 7, 2011.
2. Plaintiff/Mother was designated the residential parent and legal custodian of the minor child M.E.J. And Defendant/Father was granted parenting time with the minor child on alternating weeks from Friday at 4:00p.m. to Sunday at 12:00p.m. And a four-hour midweek block of time upon 24-hour notice to Plaintiff.
3. On March 21, 2014 the Parties agreed to Modify the Allocation of Parental Rights and Responsibilities with Plaintiff/Mother continuing as the residential parent and legal custodian and Defendant/Father receiving parenting time per the Courts Standard Order of Parenting Time pursuant to Local Rule 24.
4. On March 18, 2016 Defendant/Father filed a Motion to Modify Parental Rights and Responsibilities. The matter was scheduled for hearing and the Parties entered into an agreed entry regarding temporary custody of the minor child and visitation. The Parties agreed that Defendant/Father would be designated Temporary Legal Custodian of the minor child and that Plaintiff/Mother would have visitation, to be supervised by Plaintiff's Parents at all times through April 30, 2017 and telephone/electronic contact 5:00-6:00p.m. on days Plaintiff/Mother did not see the minor child.
5. This matter did not proceed to hearing and the temporary order was not revisited. Defendant/Father then filed an amended motion and show cause, withdrawing his prior allegations and alleging that Plaintiff/Mother was hospitalized having attempted to harm herself and further alleged that Mother had filed for and received a Domestic Violence Civil Protection Order for herself and the minor child against her then husband. Defendant/Father further alleged that Plaintiff/Mother did not notify him of the Protection Order or that she was hospitalized.
6. On August 9, 2017 the Court issued a Judgment Entry naming Defendant/Father temporary custodial parent of M.E.J. and her residential parent for school purposes. Plaintiff/Mother was given visitation for one (1) hour per week with the dates and times to be determined by

J820/760
3/14/2019

Defendant/Father. Based upon a review of the Court file and the testimony presented this Order appears to be an Exparte Order that was not set or reviewed in a full hearing. Plaintiff/Mother argued same.

7. A Guardian Ad Litem had previously been appointed in this matter, however she was removed at her own request for failure of payment of fees.
8. The minor has been appointed an attorney to represent her in this matter and to advocate her position in this case.
9. On February 20, 2018 during the hearing on Defendant's second amended motion to show cause and reallocate parental rights and responsibilities the Parties entered into an agreement of interim parenting time and that agreement was memorialized in a Court Order and Mother received visitation with the minor child to be supervised by her Father, James Patterson.
10. On April 4, 2018, the Supreme Court of Ohio appointed this Judge to preside over the case, after the Magistrate and Court recused themselves from further hearing. Based upon the refusal of the Court and the need to assign a Judge this matter was not set for further hearings until said assignment was made and then a hearing schedule was set by the Court and Counsel for Parties.
11. On September 7, 2018 the Parties and Counsel reached an agreement resolving the Motion to Vacate the Court's prior ExParte Order, due to the matter not proceeding to full hearing on the emergency order and to Modify Temporary Orders. Per the Parties' agreement, the minor child and Mother were to have visitation on seven day alternating time blocks and daily telephone contact with the Parent when not in the Parent's possession. Also, a mid-week visitation was allowed by the non-possessing Parent during that Parent's non-possession week.
12. Prior to final hearing the Defendant moved to have a Guardian Ad Litem appointed for the minor child and that Motion was granted with the stipulation that Defendant place a deposit with the Clerk of Courts for said appointment. Defendant failed to abide by the Court Order requiring a deposit for payment of Guardian Ad Litem fees and the order granting the appointment was vacated. No Guardian Ad Litem was appointed for the hearing on Defendant's Motion before the Court.
13. Based upon testimony presented Mother was hospitalized for an injury, where she cut herself with a knife in her neck area on or about April 3, 2017. The injury required medical attention, stitches, and observation in the hospital, it is unclear if the observation was solely based upon the location of the injury or also for mental health. The hospitalization was for approximately four (4) days. Father testified and alleges that the injury was self-inflicted, and that Mother was attempting to harm herself. Mother testified and alleges that the injury was an accident and occurred in an attempt to unclog a bathroom drain. Other than the Parties testimony no additional evidence was presented to support the testimony of the Parties. Mother testified that she did ingest a home remedy drain cleaner at the same time of the injury, accidentally thinking it was water, and no evidence was presented to support Father's allegation that Mother ingested "Drano" drain cleaner in an effort to harm herself. Mother did obtain counseling/therapy after this incident. Evidence was not clear as to the nature or purpose of the therapy. Testimony was clear that Mother did not inform Father of her injury or her hospitalization. Mother did make arrangements for the care of the minor child while she was hospitalized but did not tell Father about the arrangements or give Father the opportunity to care for the minor child while Mother was hospitalized. The minor child did go for her regularly scheduled visitation with Father during this time and it was

only then that Father became aware that Mother was hospitalized and not available to care for the child.

14. Mother on behalf of herself and the minor child received a Civil Protection Order as protected persons from Mother's, now ex-husband, Anthony Comfort. The incident requiring the order occurred at Mother's home with the child in the home, requiring Mother to leave and retreat across the street to her Parent's home with the minor child. Mother testified that Anthony Comfort then came to her Parent's home where she and the minor child had retreated and choked her and she and the child feared for their safety. The minor child was later removed from the Order of Protection. Mother did not notify Father of the Order or the incident leading up to the Order or the fact that the minor child was a protected person in a Civil Protection Order.
15. Evidence presented clearly indicates that Mother and Father do not get along or communicate effectively regarding the minor child. When given the opportunity both engage in conversations with the minor child and in behavior in an attempt to alienate the other from the minor child and negatively influence the minor child's relationship with the other parent.
16. The minor child is aware of the conflict that exists between her Parents and her Parent's inability to communicate effectively with each other. The minor child experiences great turmoil and stress as a result of the Parent's actions and inactions.
17. Prior to the filing and issuance of emergency orders and the Motion to Reallocate Parental Rights and Responsibilities the minor child was primarily with Mother during the week with visitation with Father on alternating long weekends. No evidence was presented that the minor child was having any difficulties with this prior schedule of companionship or the holiday or summer schedule. The minor child was doing well in school and no evidence was presented that the minor child was having any difficulties with her relationship with either her Mother or her Father. Difficulties arose after the emergency orders and the filing of the Motion to Reallocate.
18. The minor child is doing well and has acclimated to Vermillion City Schools, Father's school district. The minor did well in the Perkins School District, Mother's School District.
19. The minor child does not have any special needs and communicates well with children and adults. The minor child does not have any issues socially or developmentally and is articulate and able to communicate effectively. The minor child appears well adjusted to her school, her community and has a relationship with family on both her Mother's and her Father's side. Both Parents engage in appropriate activities with the minor child. The Court did consider the factors required in O.R.C. 3109.04 (B)(2)(a-b) and finds that the minor child has sufficient reasoning ability to express her wishes and the Court has considered the wishes expressed by the minor child and advocated by her attorney. The Court also finds that the minor child has been influenced by both Mother and Father regarding this case and their respective positions regarding each other and the minor child in this case. This Parental influence has impacted the minor child's reasoning regarding her wishes and position in this case and the Court has considered same in determining the minor child's best interest in this matter.
20. The minor child has stated to her Attorney her wish to return to Mother's custody and the minor child's Attorney has stated his client's position to the Court and the Parties regarding custody and visitation.
21. The Court finds that when given the opportunity both Parents have engaged in behavior in an attempt to alienate the child from the other Parent. Both Parents have made unsubstantiated allegations regarding the other Parent in an attempt to limit and/or stop

the other's contact with the minor child. The minor child is well aware of the thoughts and positions of her Parents regarding her custody, information that she would know, only if her Parents were discussing those positions with her and attempting to influence her as to where and with whom she wishes to live.

22. Both Parents love the minor child, both Parents engage in appropriate social activities with the minor child, are actively engaged in the child's school activities and extracurricular activities, have appropriate homes and encourage good relationships between the child and their extended families, however their relationship with each other has negatively affected their decision making for the minor child when it comes to the other's involvement in the child's life. Companionship between the minor child and both Parents is in the minor child's best interest.
23. Pursuant to ORC 3109.04 (E), based upon the evidence, the Court finds that a change of circumstance has occurred however, based upon the factors enumerated in ORC 3109.04 (F) that change in circumstances does not support a finding that it is in the minor child's best interest to modify the current Court Order with regard to custody and companionship of the minor child. It is in the minor child's best interest that the Parties place of exchange be modified and that the Parties not involve the minor child in their disputes and arguments with each other. Further, it is in the minor child's best interest that the Parties learn to communicate more effectively with each other and not involve the child in taking positions against the other parent. A modification regarding the child's activities is in the minor child's best interest as well. Activities should not be scheduled by the non-possessing parent during the possessing parent's companionship time unless specifically agreed to be the possessing parent.

Based upon the aforementioned Findings of Fact and a review of ORC 3109.04 (E) & (F) the Court concludes that the Defendant/Father has not met his burden of proof to prevail on his Motion for Reallocation of Parental Rights and Responsibilities.


WHEREFORE THE COURT HEREBY ORDERS ADJUDGES AND DECREES that the Motion for Reallocation of Parental Rights and Responsibilities is denied as to a change of custody of the minor child. It is in the minor child's best interest that the prior order of custody and companionship of March 21, 2014 remain in full force and effect, however with the following modifications:

1. Visitation exchanges shall occur at each Party's home with the receiving Party responsible for pick up unless the Party's agree otherwise.
2. Parents shall use Family Wizard, unless another service is agreed upon by both Parties, to communicate with each other regarding the minor child and the minor child's activities. The cost of same shall be equally divided and paid by the Parties. The Parties shall engage in using same within one week of journalization of this entry, which is the date the entry is filed with the Clerk of Courts.
3. Activities for the minor child shall not be scheduled by the non-possessing parent during the possessing parent's companionship time unless specifically agree to by the possessing parent.
4. If either Parent should become unavailable to care for the minor child for more than an eight (8) hour period, outside of the Parent's normal working hours, then the other parent (non-possessing parent) shall be notified immediately and given an opportunity to provide care for the minor child. If the non-possessing parent is not able to provide care for the minor child, then the possessing parent shall provide the non-possessing parent an opportunity to participate in the decision regarding

alternate arrangements for care of the minor child. If Parents are unable to agree on the alternate arrangements for the minor child (when non-possessing parent is also unavailable) then the parent who is the possessing parent (the parent whose companionship time it is at the time) shall make the decision and notify the other parent.

5. Neither Parent shall utilize the minor child for an exchange of information between the Parties or discuss conflicts that the Parties have with each other with the minor child. The Parties shall use Family Wizard or speak directly regarding the minor child and any issues regarding the minor child. Neither Party shall speak negatively of the other or engage in behavior or conversation negatively in an attempt to negatively influence or impact the relationship the minor child has with the other parent.
6. The minor child shall complete this school year (2018-2019) in her current school district, Vermilion City Schools, as there are only a few months left in the school year. Return to Mother's school district will take effect the 2019-2020 school year and thereafter unless otherwise modified by Court Order.
7. Defendant shall pay costs of this action.

IT IS SO ORDERED:


JUDGE DEBRA L. BOROS. 3/13/19
DATE

PRAECIPE OF SERVICE

TO THE CLERK:

Please serve a copy of this Judgment Entry by regular U.S. Mail, return receipt, upon the following:

Attorney Brent English
820 West Superior Avenue 9th Floor
Cleveland Ohio 44113-1818
Attorney for Plaintiff

Attorney Amanda Andrews
58 Grande Lake Drive Suite One
Port Clinton, Ohio 43452
Attorney for Defendant

Attorney Paul Dolce
25 Whittlesey Avenue
Norwalk, Ohio 44857


JUDGE DEBRA L. BOROS

APPENDIX D

Docket from Erie County Court of Common Pleas, Domestic Relations Division
Case No. 2010-DR-0008

Case Type:
DIVORCE
Case Status:
Closed
File Date:
01/12/2010
DCM Track:

Action:
Termination of Marriage With Children

Status Date:
03/18/2016

Case Judge:
Tone, Tygh M

Next Event:
08/06/2019

All Information Party Docket Disposition Additional Fields

Docket Information

Date	Docket Text	Image Avail.
12/14/2018	Order filed. It is hereby ordered that these documents shall be placed back under seal. (1) 12/17/18	Image
12/14/2018	\$250.00 Deposit Received from Matthew Johnson - deposit for Paul Dolce, attorney for minor child Receipt: 224368 Date: 12/14/2018	
12/14/2018	Statement of Reporter's Cost	Image
12/14/2018	Statement of Reporter's Cost	Image
12/18/2018	Notice Of Hearing Filed - Show Cause shall be heard on 1-24-19 @ 9 am	Image
01/02/2019	J. E. filed. The Parties (except for M.E.J. represented by Paul Dolce) shall file proposed J.E. with findings of fact and conclusions of Law by 4:00 pm on January 4, 2019, further orders as set forth. (2) 01-02-19 copies sent to: Atty English and Atty Andrews and Atty Dolce	Image
01/02/2019	U. S. Regular Mail - Postage	
01/04/2019	Notice of Submission of Plaintiff's Proposed Final J.E. with Findings of Fact and Conclusions of Law filed Attorney: English Esq, Brent L (0022678)	Image
01/08/2019	Findings of Fact and Conclusions of Law Filed (FAX COPY)	Image
01/11/2019	Motion to Strike Defendant's Proposed Findings of Fact and conclusions of Law filed Attorney: English Esq, Brent L (0022678)	Image
01/11/2019	Corrected Motion to Strike Defendant's Proposed Findings of Fact and Conclusions of Law filed Attorney: English Esq, Brent L (0022678)	Image
01/24/2019	Motion to Continue Contempt hearing filed (fax copy) Attorney: English Esq, Brent L (0022678)	Image
01/24/2019	J. E. filed. Contempt Hearing for 1-24-19 will be rescheduled for a later date. (1) 1-24-19 copy sent to: Atty English and Atty Andrews	Image
01/24/2019	U. S. Regular Mail - Postage	
01/25/2019	Hearing Notice filed - Trial on the Merits on April 3, 2019 @ 9:00 am	Image
03/13/2019	Judgment Entry (On Defendant, Mathew V. Johnson 's Second Amended Motion to Reallocate Parental Rights and Responsibilities) Filed.	Image
03/14/2019	Certified Copy of Judgment Entry Sent to Attorney for Plaintiff, Attorney for Defendant and Attorney Paul Dolce	
03/14/2019	Issue Date: 03/14/2019 Service: Certified Copies sent to Method: Regular mail w/Certificate of Mailing Cost Per: \$0.00	

03/19/2019 Filed

Method : Regular mail w/Certificate of Mailing
Issued : 03/14/2019
Service : Certified Copies sent to
Served : 03/18/2019
Return : 03/19/2019
On : Andrews, Amanda A
Signed By :

[Image](#)

Reason : Certificate of Mailing filed
Comment :

Tracking #: C000015573

03/19/2019 Filed

Method : Regular mail w/Certificate of Mailing
Issued : 03/14/2019
Service : Certified Copies sent to
Served : 03/18/2019
Return : 03/19/2019
On : English Esq, Brent L
Signed By :

[Image](#)

Reason : Certificate of Mailing filed
Comment :

Tracking #: C000015572

03/19/2019 Filed

Method : Regular mail w/Certificate of Mailing
Issued : 03/14/2019
Service : Certified Copies sent to
Served : 03/18/2019
Return : 03/19/2019
On : Dolce, Paul
Signed By :

[Image](#)

Reason : Certificate of Mailing filed
Comment :

Tracking #: C000015574

03/25/2019 RECEIVED: Notice of Appeal (E-19-0018) Filed in the Sixth District Court of Appeals

[Image](#)

03/25/2019 Praecipe filed. (TRANSCRIPT REQUESTED: December 10-14, 2018) No Court Reporter Information
Attorney: Andrews, Amanda A (0088814)

[Image](#)

03/25/2019 Docketing Statement (Regular Calendar)
Attorney: Andrews, Amanda A (0088814)

[Image](#)

03/25/2019 Motion for Stay of Judgment Entry Pending Appeal
Attorney: Andrews, Amanda A (0088814)

[Image](#)

04/01/2019 Mary A. Peterson's Motion for Continuance of Show Cause Hearing Due to Ongoing Criminal Jury Trial Conflict filed (FAX COPY)

[Image](#)

04/02/2019 Defendant's request to stay the March 13, 2019 J.E. , Decision of this Court, is denied. (1) 4-2-19
copy sent to: Atty English and Atty Andrews

[Image](#)

04/02/2019 J. E. filed. Plaintiff's request for continuance of the April 3, 2019 contempt hearing is granted. The contempt hearing is continued to May 15, 2019 @ 9:00 am (1) 4-2-19
copy sent to: Atty English and Atty Andrews

[Image](#)

04/02/2019 U. S. Regular Mail - Postage

04/12/2019 MANDATE filed. (E-19-018) Appeal DISMISSED. Filed in wrong court.- Arlene Singer, J; Christine E. Mayle, P.J.; Gene A. Zmudaa, J.-CONCUR. (2) 4-12-19

[Image](#)

04/22/2019 Notice of Appeal filed Sixth District Court of Appeals. (E-19-0027)
Attorney: Andrews, Amanda A (0088814)

[Image](#)

04/22/2019 Praecipe filed. (TRANSCRIPT REQUESTED: December 10-14, 2018) Reord Due: June 3, 2019
Attorney: Andrews, Amanda A (0088814)

[Image](#)

04/22/2019 Motion for Reconsideration of Defendant's Motion to Stay Judgment Entry Pending Appeal filed
Attorney: Andrews, Amanda A (0088814)

[Image](#)

05/01/2019 J. E. filed. Defendant's second request to stay the J.E. , Decision of this court , is denied. (1) 5-1-19
copy sent to : Atty english and Atty Andrews

[Image](#)

05/01/2019 U. S. Regular Mail - Postage

05/14/2019 Motion for A continuance of Hearing Due to On-Going Trial Conflict filed

[Image](#)

05/14/2019 Order filed. Motion for continuance is granted. (1) 5-14-19
copy sent to: Atty English, Atty Andrews

[Image](#)

05/14/2019 U. S. Regular Mail - Postage

05/15/2019 MANDATE filed. (E-19-0027) Appeal DISMISSED. -Mark L. Pietrykowski, J; Arlene Singer, J; Thomas J. Osowik, J. -CONCUR.
(2) 5-15-19

[image](#)

05/23/2019 Hearing Scheduled for Trial on August 6, 2019 @ 9 am

[image](#)

APPENDIX E

Docket from Sixth District Court of Appeals
Case No. E-19-0018

Case Type:
COURT OF APPEALS

Case Status:
Dismissed

File Date:
03/25/2019

DCM Track:

Action:
Appeal to Court of Appeals

Status Date:
03/25/2019

Case Judge:

Next Event:

All Information Party Docket Disposition

Docket Information

<u>Date</u>	<u>Docket Text</u>	<u>Image Avail.</u>
03/25/2019	Notice of Appeal Filed - Sixth District Court of Appeals Attorney: Andrews, Amanda A (0088814) Receipt: 227994 Date: 03/27/2019	Image
03/25/2019	Praeipce filed. (TRANSCRIPT REQUESTED: December 10-14, 2018) Attorney: Andrews, Amanda A (0088814)	Image
03/25/2019	Docketing Statement (Regular Calendar) Attorney: Andrews, Amanda A (0088814)	Image
03/25/2019	RECEIVED: Copy of Trial Court Docket from Erie County Court of Common Pleas, Domestic Relations Division Case No. 2010-DR-0008	Image
03/27/2019	Copies Sent Regular Mail to: Paul Dolce, 25 Whittlesey Avenue, Norwalk, OH 44857; Brent English, 820 Superior Avenue, 9th Floor, Cleveland, OH 44113; Amanda Andrews, 58 Grand Lake Drive, Suite 1, Port Clinton, OH 43452; Judge Debra L. Boros c/o Judge Tygh M. Tone; Court of Appeals Sent on: 03/27/2019 08:38:06.20	
04/11/2019	Decision and Judgment Entry filed. Appeal before court sua sponte. Appellant filed the Notice of Appeal in the wrong court and, therefore, this court lacks jurisdiction to address the appeal. The notice of appeal is ordered STRICKEN and this appeal is DISMISSED. Appellant to pay costs. - Arlene Singer, J; Christine E. Mayle, P.J.; Gene A. Zmuda, J.-CONCUR. (2) 4-12-19	Image
04/11/2019	MANDATE issued to Erie County Court of Common Pleas, Domestic Relations Division Case No. 2010-DR-0008	
04/12/2019	Certified Copy Sent to: Paul Dolce, 25 Whittlesey Avenue, Norwalk, OH 44857; Brent English, 820 Superior Avenue, 9th Floor, Cleveland, OH 44113; Amanda Andrews, 58 Grand Lake Drive, Suite 1, Port Clinton, OH 43452; Judge Debra L. Boros c/o Judge Tygh M. Tone; Court of Appeals Sent on: 04/12/2019 08:24:56.51	
05/01/2019	Motion for Reconsideration filed Attorney: Andrews, Amanda A (0088814)	Image
05/16/2019	Brief in Opposition to Appellant's Untimely and Meritless Application for Reconsideration filed Attorney: English Esq, Brent L (0022678)	Image