

PETITION FOR REHEARING

NOW COMES the Intervenor/Appellee, the Honorable Judge Pamela E. Hill Veal (hereinafter referred to as "Judge Veal"), by and through her attorneys, Barclay, Dixon & Smith, P.C., Denise Brewer & Associates, and Law Office of Deborah L. King, and pursuant to Illinois Supreme Court Rule ("Rule") 367, petitions this Court for a rehearing to reconsider its jurisdiction to hear the appeal and its September 16, 2008, Opinion. (See a true and correct copy of the Opinion attached hereto as the Appendix). Judge Veal contends that a rehearing is warranted due to Contemnor-Appellant Allison Smith's ("Smith") failure to comply with the Illinois Supreme Court Rules, which led to the Court's misapprehension of pertinent facts and the legal significance of Smith's noncompliance.

I. SMITH DID NOT COMPLY WITH SUPREME COURT RULE 303(c).

Smith appeared before Judge Veal on May 24, 2007 as attorney of record for her client, the defendant in the underlying civil action. As a result of Smith's conduct before Judge Veal, an Order of direct criminal contempt was entered against Smith. (R. C20-C23). A notice of appeal was filed with the Clerk of the Circuit Court on June 22, 2007. (R. C43-C45). However, the law requires that in addition to filing the notice of appeal with the circuit court clerk, a party seeking to review a trial court judgment must also give appropriate notice of the appeal to all persons of interest. The Illinois Supreme Court has well-established that strict compliance with its rules is generally required. *Village of Lake Villa v. Stokovich*, 211 Ill.2d 106, 116, 810 N.E.2d

13 (2004). Specifically, Rule 303(c) requires that: "The party filing the notice of appeal or an amendment as of right, shall, within 7 days, file a notice of filing with the re-viewing court and serve a copy of the notice of appeal upon every other party, and upon any other person or officer entitled by law to notice. Proof of service, as provided by Rule 12, shall be filed with the notice." Ill. S. Ct. Rule 303(c) (emphasis added). This duty to inform all interested persons, parties and non-parties is mandatory.

This Court, when previously addressing the issue of the Illinois Supreme Court's requirement for serving the notice of appeal, held that: "The purpose of a notice to appeal is to inform the party in whose favor a judgment has been rendered that the unsuccessful party desires review...." Ebert v. Dr. Scholl's Foot Comfort Shops, Inc., 137 Ill. App. 3d 550, 556, 484 N.E. 2d 1178 (1st Dist. 1985). Furthermore, this Court dismissed an appeal for an appellant's failure to comply with the Rules to provide notice of appeal to county officers where a reversal of the trial court's judgment (as requested by the appellant in the appeal) could adversely affect the officers who would be deprived of the benefit of the trial court's favorable interpretation of the officer's authority. Leyden Fire Protection Dist. v. Township Bd. Of Leyden Township, 26 Ill. App. 3d 569, 573, 325 N.E.2d 796 (1st Dist. 1975).

In the instant case, Smith failed to serve a notice of appeal upon Judge Veal or the Office of the Cook County State's Attorney, which, by law (55 ILCS §5/3-9005), is Judge Veal's authorized legal representative in matters concerning issuance of contempt orders pursuant to her judicial duties. Yet, the judgment sought to be reviewed was Judge Veal's ruling that Smith's conduct before Judge Veal

constituted direct criminal contempt. Any review that could result in reversing Judge Veal's finding that Smith had engaged in contemptuous conduct against and in the presence of Judge Veal, would adversely affect Judge Veal and the People of the State of Illinois, in whose name the direct contempt Order was issued. As such, Judge Veal and the Cook County State's Attorney were parties to whom notice was required to be given.

Indeed, Judge Veal was first made aware of the appeal of her May 24, 2007 Order more than one year after the Notice of Appeal was filed when a Daily Law Bulletin reporter contacted her on September 17, 2008. The reporter asked Judge Veal if she had any comment regarding the Court's September 16, 2008 decision. Prior to that date, Judge Veal was never notified that her May 24, 2007 Order had been appealed.

Furthermore, a review of the Record on Appeal does not contain the required Rule 303(c) notice of filing and proof of service. Thus, apparently Smith even failed to send notice of appeal to the party she named as appellee, Nazariy Petrakh, the *pro se* plaintiff in the underlying civil case in the trial court.

It is important to note that Smith failed to name the appropriate Appellee in its caption of the case on appeal. The Order of direct criminal contempt entered on May 24, 2007, correctly captioned the judgment at issue as "The People of the State of Illinois v. Allison Smith." (R. C20-C23). See, e.g., In re Contempt of Morris W. Ellis, 206 Ill. App. 3d 388, 564 N.E.2d 186 (4th Dist. 1991)(caption in reviewing court reflected parties in criminal contempt proceedings occurring in a small claims civil matter) and In re Commitment of Lionel A. Sherwin, 270 Ill. App. 616 (1933)

(reflecting errors in parties as identified before the reviewing court in contempt proceedings against attorney in civil matter). Smith chose not to use, or reference, the caption from the Order that she is now appealing in the reviewing court, which violated Rule 330. In pertinent part, Rule 330 requires that any document, with the stated exceptions, filed in the reviewing court shall contain a caption that includes the case name as it appeared in the trial court and denotes the party's status in the reviewing court. Ill. S. Ct. Rule 330(a)(3). Thus, the People of the State of Illinois were not identified as the proper Appellee in this Appellate Court and were never notified of this appeal.

Also, it is important to note that Judge Veal was concerned about the *pro se* plaintiff's right to notice when she questioned Smith's "notice" of a discretionary emergency motion and an Order that reflected an improper heading presented to Judge Veal on May 24, 2007. Smith's conduct during the proceedings in which Judge Veal questioned whether Smith provided adequate notice ultimately led to the Order that Smith now appeals. (R. C8, C13, C18, C20-C23).

Because of Smith's failure to provide notice of the appeal to the proper appellee and parties that would be adversely affected by the appeal's outcome, parties were deprived of an opportunity to address the Appellate Court on the issues raised by Smith. This deprivation of notice constitutes a violation of the fundamental principles of due process under the law. See generally Tri-G v. Burke, Bosselman & Weaver, 222 Ill. 2d 218, 244-45, 856 N.E.2d 389 (2006) ("[f]undamental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated...to apprise interested parties of the pendency of the action

and afford them an opportunity to present their objections.”) (internal citations omitted). For this reason, this Court’s September 16, 2008 decision should be vacated and the appeal dismissed due to Smith’s failure to comply with the aforementioned Rules that denied due process to the affected parties, particularly Judge Veal, and an opportunity to present any objections.

II. SMITH’S BYSTANDER’S REPORT DID NOT COMPLY WITH SUPREME COURT RULE 323.

Additionally, Smith failed to comply with a second set of rules that warrants dismissing her appeal. According to Illinois Supreme Court Rules 321 and 326, a Record on Appeal, consisting of the entire common law record of the case, including the judgment order that has been appealed and the notice of appeal, is required to be filed with the reviewing court by the appellant within 63 days after the notice of appeal is filed. Rule 321 also states that “[t]he record on appeal shall also include any report of proceedings prepared in accordance with Rule 323.”

Rule 323 outlines the process by which an appellant is to certify and file a report of proceedings for the Record on Appeal. Rule 323 requires that a Bystander’s report of proceedings should be presented to the trial judge of record on the case for certification. Ill. S. Ct. Rule 323(b), (c). Smith failed to serve her “Unopposed Motion to Certify Bystander’s Report for Appeal,” with her proposed bystander’s report attached, on Judge Veal for certification. (R. Vol. 2, 005-0010). Indeed, the Record on Appeal shows that the Notice of Motion for said “unopposed” motion set the hearing in Courtroom 1501, and not in Judge Veal’s Courtroom 1102. (R. Vol.2, 003-004). As stated in Section 1, Smith failed to serve notice of the appeal upon all relevant parties. Thus, all parties were not afforded

an opportunity to review the proposed report and submit any objections. Due to Smith's actions, the bystander's report was certified by a judge other than Judge Veal. (R. Vol. 2, 002). Once again, Smith's conduct violated due process and evidenced an intentional act of circumventing judicial procedures and the Supreme Court Rules.

The Illinois Supreme Court established that it was the "exclusive province" of the trial judge that tried a case to determine the accuracy of, and certify, a report of proceedings. Bauman v. C.I.T. Corp., 356 Ill. 336, 339, 190 N.E. 696 (1934). In Shafer v. Northside Inn, Inc., 36 Ill. App. 2d 441, 184 N.E. 2d 756 (1st Dist. 1962), the Illinois Appellate Court followed this precedent when it ruled that it is improper for a judge that is not the trial judge of record to certify a Bystander's report of proceedings, unless it is shown in the record why the report was not presented to the trial judge. The Shafer Court held that the record must "affirmatively" show that the trial judge was unable to certify the record due to death, sickness, disability or other absence. 361 Ill. App. 2d at 444. Smith made no such showing in this case.

In the instant case, this Court noted in its September 16, 2008 decision that the certification of the bystander's report of proceedings was signed by Judge Moira Johnson, and not Judge Veal. (Appendix, fn. 1, pp.2-3). This Court then addressed the issues in the case raised by Smith even though there was no evidence that Smith ever presented the bystander's report to Judge Veal and no evidence of Judge Veal's inability as defined under Rule 323(b) to certify the bystander's report.

The Court's action regarding the improperly certified bystander's report misapprehends the law and is judicial error. The case law concerning an appellant's failure to certify and file a bystander's report in accordance with Rule 323 is well established. The Illinois Supreme Court has held that the reviewing court has no authority to review and consider issues raised on appeal when the report of proceedings necessary to consider those issues is not properly before the reviewing court. Lukas v. Lukas, 381 Ill. 429, 431-433, 45 N.E. 2d 869 (1942). This historic precedent from the state's highest court was followed by this Court in Hall v. Turney, 56 Ill. App. 3d 644, 650, 371 N.E. 2d 1177 (1st Dist. 1977).

Moreover, this Court definitively ruled that: "Where compliance has not been had with Rules 323 and 326, the appropriate action is to dismiss the appeal or summarily affirm without considering the merits of the case." Portock v. Freeman, 53 Ill. App. 3d 1027, 1032, 369 N.E. 2d 201 (1st Dist. 1977). This decision follows the legal precedent set by the Illinois Supreme Court in Renfield Importers, Ltd. v. Modern Liquors, Inc., 55 Ill. 2d 546, 304 N.E. 2d 626 (1973) (upheld dismissal of appeal for appellant's failure to adhere to Rules 323 and 326).

Thus, this Court improperly reviewed the issues raised by Smith and rendered a decision based upon a report of proceedings, which Smith presented as "unopposed," that did not comport with the requirements of the law. As such, this Court must not only strike Smith's improper bystander's report, but either

dismiss the appeal or affirm the May 24, 2007 Direct Contempt Order entered by Judge Veal.

CONCLUSION

Smith failed to comply with the Illinois Supreme Court Rules in her appeal of the May 24, 2007 direct contempt order. First, she failed to properly caption the matter before the reviewing court to identify the "People of the State of Illinois" as the appellee in violation of Rule 330, since she sought review of the direct criminal contempt Order. Second, she failed to serve the notice of appeal on any parties, particularly the parties to the criminal contempt order that she appeals from, who would be affected by its outcome in violation of Rule 303(c). Consequently, the People of the State of Illinois and Judge Veal, who issued the criminal contempt order, were denied an opportunity to be heard before this Court and present any objections. Third, Smith failed to present the proposed bystander's report to Judge Veal, the trial court judge, for certification in violation of Rule 323. By law, as stated by the Illinois Supreme Court, Smith's non-compliance with these rules requires that this Court dismiss the appeal or affirm the May 24, 2007 direct criminal contempt order. Substantial justice requires nothing less.

WHEREFORE, Intevenor/Appellee, the Honorable Pamela E. Hill Veal, respectfully requests that this Court: (1) grant this Petition For Rehearing, including ordering and permitting oral argument; (2) vacate its September 16, 2008 Order in its entirety; (3) strike the improper bystander's report, (4) amend the caption for this case to reflect the proper parties per the direct criminal contempt Order

that Smith appeals; (5) either dismiss this appeal or affirm the May 24, 2007 direct contempt order; and (6) grant her such further relief deemed just and proper.

Respectfully submitted,

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