REPLY IN FURTHER SUPPORT OF 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 this Court's Order of October 8, 2008, replies to Contemnor-Appellant Allison Smith's ("Smith") Answer To Petition For Rehearing ("Answer"). Judge Veal maintains that a rehearing and a reconsideration of this Court's September 16, 2008, Opinion is warranted due to Smith's failure to comply with Illinois Supreme Court Rules ("Rules") in submitting her appeal, particularly an improperly certified Bystander's Report. Smith's response to the Petition for Rehearing ("Petition") has no legal merit, asserts repeated and bald, self-serving assertions, and should be emphatically rejected.

I. JUDGE VEAL HAS STANDING TO INTERVENE IN THIS APPEAL.[1]

First, Smith contends that Judge Veal lacks legal standing to intervene in this matter, because Judge Veal was not a party in the trial court proceedings. While it is generally true that a person who was not a party in the trial court proceedings would not have legal standing to participate in the review of the trial court's findings before the appellate court, the law recognizes that in certain circumstances, the non-party has the right to address the appellate court on the matters being reviewed. Indeed, while Smith correctly cites two cases enunciating the rule of law that grants non-parties standing in appellate court proceedings, Smith fails to correctly interpret and apply this non-party exception rule to the instant facts that confers standing upon Judge Veal to intervene.

[1] Of note, on or about October 16, 2008, this Court granted Judge Veal's Motion for Leave to file her Appearance *Instanter*, which also set forth the primary tenets that she intended to raise in her Petition.

The case law establishing legal standing for non-parties can be found in In re Estate of Tomlinson, 65 Ill. 2d 382, 359 N.E. 2d 109 (1976), which states that "[i]nterests that will justify an appeal by one not a party must be direct, immediate and substantial. It must be an interest which would be prejudiced by the judgment or benefit from its reversal." 65 Ill. 2d at 387. In Tomlinson, the Illinois Supreme Court considered whether the Attorney General had standing to appear as an intervenor in the review of a ruling in a probate proceeding involving a charitable trust. The Court ruled that the Attorney General did have proper standing due to his interest as the public official authorized by statute to protect charitable trusts and their property. 65 Ill. 2d at 387.

In People v. Pine, 129 Ill. 2d 88, 542 N.E. 2d 711 (1989), the Illinois Supreme Court cited the Tomlinson case when confronted with a similar issue. In Pine, the Secretary of State filed a petition for leave to appeal an appellate court decision dismissing the Secretary of State's appeal after deciding that the public official lacked legal standing to appeal a trial court order involving a driver's court petition for a judicial driver permit. The Court reversed the appellate court's decision denying standing, based on its analysis that the Secretary of State had an interest in the matter as the public official charged by state legislature to administer and enforce the laws "[g]overning the conduct of drivers on the roads and is statutorily directed to observe, administer and enforce the provisions of the [Illinois Vehicle] Code." 129 Ill. 2d at 96.

Contrary to the cases that Smith cites in her Answer, case law from the Illinois Appellate Court holding that a non-party governmental body or governmental officer has the proper legal standing under similar circumstances as present in the case at bar does exist. In Layfer v. Tucker, 71 Ill. App. 3d 333, 389 N.E. 2d 252 (2nd Dist. 1979),

the appellate court ruled that the State's Attorney General and the Treasurer of the State, though non-parties in the lower court, had standing on appeal to litigate the lower court's decision on an award of attorneys' fees. The Layfer Court held that since the State had a right to the funds from which the attorneys' fees were to be awarded, the State had an appealable interest. 71 Ill. App. 3d at 336. In contrast, Smith mistakenly relies upon Board of Trustees of Community College Dist. No. 508 v. Rosewell, 262 Ill. App. 3d 938, 635 N.E. 2d 413 (1st Dist. 1992), which is distinguishable from the afore-said cases. In Rosewell, the reviewing court denied standing for the non-party governmental agency in determining that the State's Attorney's standing would require it to oppose the interests that it represented throughout the trial litigation. 262 Ill. App. 3d at 955.

Accordingly, in the instant case, Judge Veal has legal standing to intervene in Smith's appeal to highlight Smith's noncompliance with the Rules and a direct interest in the outcome of the appeal. Judge Veal is a public official who is authorized to administer and enforce Illinois Supreme Court Rules, the Illinois Code of Civil Procedure, and the Local Circuit Court Rules. As a judicial officer, it is not only Judge Veal's duty to maintain the decorum and integrity of the court, it is also her duty to ensure that litigants and their counsel who appear before her maintain the same decorum and integrity.

As this Court noted in its September 16, 2008 Opinion, "[d]irect criminal contempt of court has been defined as conduct 'calculated to embarrass...or obstruct [the] court in its administration of justice...." (Pet. For Rhrg., App. at 6). Therefore, Judge Veal, being the judge against whom contemptuous conduct was directed, would have

an immediate, direct and substantial interest in the appeal of any judgment of direct criminal contempt that she issued for conduct that occurred in her presence as she presided over the proceedings in her official judicial capacity. Since the direct criminal contempt order is the subject matter of Smith's appeal, Judge Veal, by law and as a public judicial officer, has sufficient interest that allows her standing before this Court.

II. SMITH'S APPELLATE CAPTION IS INCORRECT.

Second, Smith argues that she properly captioned her appeal and thereby did not violate Rule 330. (Answer at p. 3). For sure, her noncompliance is more than a "misnomer." (Id.). Smith contends that her use of the case caption from the underlying civil case *alone* was sufficient, and cites three cases in support of her position. However, all three cases that Smith cites involve **indirect civil contempt** and **indirect criminal contempt orders** for contemptuous conduct in the form of violating trial court orders or that which occurred outside of the trial courtroom. *See* McClean County v. Kickapoo Creek, Inc., 51 Ill. 2d 353, 282 N.E.2d 720 (1972) (against party for violating permanent injunction in underlying civil case); In re Marriage of D'Attomo, 211 Ill. App. 3d 914, 570 N.E.2d 796 (1st Dist. 1991)(against spouse for absconding with minor child to another country during divorce proceedings); an Falcon, Ltd. V. Corr's Natural Beverages, Inc., 173 Ill. App. 3d 291, 527 N.E.2d 904 (1st Dist. 1988)(contempt orders for violating court orders). Although the Answer dismisses the cases that Judge Veal cites noting the proper parties (by case name) in appeals of criminal contempt orders issued against attorneys, Smith proffers not one credible case distinguishing the cases.

Here, however, the May 24, 2007 Order of Judge Veal was a direct criminal contempt order entered against Smith for conduct that occurred in open court. As the cases cited by Smith are easily distinguishable, they are wholly irrelevant.

Further, Smith can not justify her apparent ignorance of the Rules or shift blame upon Judge Veal. Smith's non-compliance is not excused, because Smith stated the parties reflected in the caption from the underlying civil case. The Rules impose an affirmative duty upon Smith, the appellant, to include all pertinent information regarding the judgment or Order appealed from in formulating the caption for documents submitted to the reviewing court per Rule 330. *See* Rule 330(a). As Judge Veal referenced the caption that was reflected in the motion to vacate that Smith prepared, for identification purposes in this Court, and has requested that this Court amend the caption to reflect the proper parties, such does not alleviate Smith from adhering to the Rules.

Moreover, she misstates, or misunderstands, Judge Veal's argument regarding the magnitude of her failure to include a proper caption. Had Smith named the proper appellee, "The People of the State of Illinois," as reflected in the Order that she undisputedly appeals, it would be patently obvious that the purported proof of service (and consequently Notice of Appeal) was deficient as it was not served upon the "People." Similarly, had the "People" been properly notified, Judge Veal would have received notice as she would have surely been conferred with by the "People's" counsel regarding the matters raised, Consequently, Smith's failure to certify a proper Bystander's Report would have been revealed and brought to this Court's attention sooner. While Smith added her name to the appellate caption, she could have also

easily added the "People of the State of Illinois." Her failure to do so can hardly be deemed a "misnomer."

III. THE STATE'S ATTORNEY AND JUDGE VEAL WERE ENTITLED TO NOTICE OF SMITH'S APPEAL.

Third, Smith argues that she complied with Rule 303(c) and provided notice of her appeal to all parties entitled to notice. (Answer at p. 4). Smith attaches the notices of filing that she presented to the Circuit Court and Appellate Court Clerks to her Answer. The initial review by Judge Veal's attorneys of the Record on Appeal ("Record") did not reflect any such document. Indeed, the copies attached to the Answer do not reflect the Record stamping and the Answer does not reflect where they were contained in the Record. Additionally, Smith's reference to Rules 381 and 383 is a thinly veiled smokescreen and utterly ignores that the appeal of the contempt finding had to comply with the Rules, including the time in which an appeal may be filed per Rule 303. *See* Rule 304(b)(5)(listing contempt orders as appealable without a finding under Rule 304(a)).

More important, neither attachment reflects notice to the State's Attorney or Judge Veal as they should have. Smith admits that the May 24, 2007, Order of Direct Criminal Contempt was captioned, "People of the State of Illinois v. Smith." (Answer at p. 3). As such, since this was the only judgment order that she appealed, Smith should have notified the party known as "People of the State of Illinois." In direct contravention of the fundamental principles of due process, Smith failed to do so.

IV. SMITH'S BYSTANDER REPORT WAS NOT PROPERLY CERTIFIED.

Fourth, Smith argues that the Bystander's Report that she filed in this appeal was properly certified in accordance with Rule 323(c). Smith claims that since the un-

derlying civil case was transferred from Judge Veal's courtroom at the time of the appeal, she postures that the certification by Judge Moira Johnson was proper. (Answer at p. 5). Smith also contends that a Bystander's Report does not have to be certified by the judge before whom the proceedings in question were held. This argument has no legal merit.

Contrary to Smith's implications, a Bystander's Report is a report of proceedings for purposes of appeal, and the language in Rule 323(b) requiring that the certification of the report of proceedings by the relevant trial judge is just as applicable to Bystander's Reports as it is to a court reporter's transcript. Rule 323 distinguishes between a court reporter's transcript report of proceedings (Rule 323(b)) and a Bystander's Report (non-verbatim transcript) report of proceedings (Rule 323 (c)) for the sole purpose of instructing appellate court litigants on the procedure for providing a report of proceedings for the Record when no verbatim transcript exists. Yet, Smith asserts that the Bystander's report can be certified by a different trial judge, because the language in Rule 323 (c) says that it should be presented to the "trial court". (Answer at p. 5) Smith interprets the term "trial court" as meaning any judge, but cites no authority for her interpretation.

Indeed, Smith's interpretation is inconsistent with the Illinois Appellate Court's ruling that a Bystander's Report based solely on the appellant's interpretation and memory, without input from the appellee or trial judge, presented and considered for review by the appellate court contradicts the purpose and intent of Rule 323. City of Pekin v. Mann, 44 Ill. App. 3d 1, 2-3, 357 N.E. 2d 728 (3rd Dist. 1976) Surely, to interpret the statute as Smith proposes would mean that a judge sitting in the probate divi-

sion could certify proceedings in a domestic relations matter. It would also mean that, as here, litigants could attempt to forum shop for judges in the certification process. The legislature clearly did not intend such a biased outcome in promulgating Rule 323.

Furthermore, it defies logic to say that if there is a court reporter's transcript, then the trial judge's certification is necessary to ensure accuracy of the record; whereas if a bystander's report is compiled from memory, then any trial judge's certification of the accuracy of the purported proceedings and facts suffices. Indeed, a trial court judge's certification that facts based upon that judge's and the parties' memories, and set out in a non-verbatim bystander's report, are accurate would be more essential than certification where a certified court reporter has contemporaneously recorded a transcript of the court proceedings.

Moreover, Smith fails to sufficiently dispute Judge Veal's citation of cases to support her argument that Smith failed to comply with Rule 323. In her Answer, Smith criticizes the case law cited by Judge Veal saying that those cases construe "archaic and superseded provisions" of Rule 323. (Answer at p. 5). Yet, Smith does not, and cannot, argue that the cases cited by Judge Veal have been reversed, or that the analysis and rulings made by those courts have been reversed. Indeed, the court holdings cited remain current law, i.e., certification of report of proceedings, whether by verbatim transcripts or non-verbatim bystander's report, should be made by the trial court judge before whom the proceedings were held, and if not, the appeal must be dismissed.

Contrary to Smith's assertions, the fact that the case was transferred from Judge Veal's courtroom has no bearing on which judge was authorized to certify Smith's Bystander's Report. The Court has well-established that if there are several different

issues raised on appeal, and different judges presided over the different issues in the trial court, the certification of the report of proceedings must be made by each judge as to the specific issue over which he or she presided. Taylorville Sanitary Dist. v. Nelson, 334 Ill. 510, 513-514, 166 N.E. 60 (1925); Midland Oil Co. v. Packers Motor Transport, 277 Ill. App. 451, 455 (1st Dist. 1934).

In the instant case, this then means that Judge Moira Johnson would only be able to certify proceedings that concerned appellate issues addressed by her in the trial court. Yet, only Judge Veal was involved in the proceedings and could certify the proceedings raised by Smith in her appeal of the May 24, 2007 Order.[2] For sure, the Record is devoid of any credible and sufficient showing that Judge Veal was incapacitated as defined by Rule 323(b) and unable to review or certify a Bystander's Report.

Not only did Smith fail to have Judge Veal properly certify, but Smith filed certain documents with this Court suggesting she had no intention to do so. In the Docketing Statement that Smith filed on July 6, 2007, and before she filed her proposed Bystander's Report, Smith stated, in Paragraph 8, that that the appeal should be expedited because: "Second, there is no report of proceedings or substitute evidentiary record that could conceivably support the orders on appeal. Third, no party will be arguing in support of affirming these orders. The appeal will literally be unopposed." By her filing, Smith ensured that she could litigate this appeal "unopposed" by not serving notice of the appeal to Judge Veal or the State's Attorney, and by not submitting her proposed bystander's report to Judge Veal for certification.

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[2] As this Court noted in its Opinion, "'[d]irect criminal contempt is contemptuous conduct occurring 'in the very presence of the judge, making all the elements of the offense matters within [her] personal knowledge....' " (internal citations omitted) (Pet. for Rehearing, App. at p. 7).

Yet, Smith criticizes Judge Veal's Petition for not showing any facts misapprehended by the Court. (Answer at p. 5) This criticism misrepresents Judge Veal's arguments in her Petition. Judge Veal argued that the Court misapprehended the legal significance of Smith's failure to comply with the Rules. Smith then criticizes Judge Veal for not pointing out any substantive defects or inaccuracies in the bystander's report that was certified by Judge Moira Johnson. (Answer at p. 5). Smith's last argument underscores her failure to understand the Petition's substance and the governing procedure.

Rule 367, which outlines the procedures for submitting Petitions for Rehearing, provides that "re-argument of the case shall not be made in the petition." Ill. S. Ct. Rule 367(b). Thus, without leave of this Court, Judge Veal has not attempted to argue the merits of case. This is especially true since without the proper Bystander's Report, matters that Judge Veal would raise and argue are not in the existing Record. For sure, Judge Veal's Petition does not acknowledge the accuracy of Smith's bystander's report.

Judge Veal argues that had she been given the opportunity to address such matters through a proper certification process, she would have done so. It is important to note here that Judge Moira Johnson's "certification" order does not verify the accuracy of the facts asserted in the Bystander's Report, it only states that no party disagreed with the report. (R. Vol. 2, 002). Rule 323(c) requires that an "accurate" Bystander's Report be filed with the appellate court. Judge Moira Johnson's order did not verify the report's accuracy, and could not do so, because Judge Johnson did not preside over the proceedings resulting in the direct criminal contempt order that Smith

appeals. Indeed, the profound procedural deficiencies, as a threshold matter and which constitute fatal errors, do not lead to or warrant addressing the merits.

CONCLUSION

In sum, Smith's arguments in her Answer to Judge Veal's Petition lack legal or factual merit. Smith's argument that Judge Veal does not have standing before this Court ignores the case law on standing for non-party public officials. In response to Judge Veal's argument that Smith has not complied with Illinois Supreme Court Rules, Smith fails to cite either any controlling or persuasive cases for some of her positions that are relevant to the issue on appeal: a direct criminal contempt order.

WHEREFORE, Intervenor-Appellee, the Honorable Judge Pamela E. Hill Veal, respectfully requests that this Honorable Court: (1) grant this Petition For Rehearing; (2) vacate its September 16, 2008 Order in its entirety; (3) strike the bystander's report that Smith presented, (4) amend the caption for this case to reflect the appropriate parties in the appeal of the direct criminal contempt order; and (5) either dismiss this appeal or affirm the May 24, 2007 direct criminal contempt order.

Respectfully Submitted,
THE HONORABLE PAMELA E. HILL VEAL

By: Crystal L. Roberts
One of Her Attorneys

Lester L. Barclay
Crystal L. Roberts
Barclay, Dixon & Smith, P.C.
39 S. LaSalle St., Ste. 900
Chicago, Illinois 60603
(312) 553-0123