

[Cite as *Cook v. Smith*, 2012-Ohio-4951.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Brandt Cook et al., :
 :
 Plaintiffs-Appellants, :
 :
 v. : No. 12AP-489
 : (C.P.C. No. 10CV-12-18194)
 :
 Scott Elliot Smith et al., : (REGULAR CALENDAR)
 :
 Defendants-Appellees. :

D E C I S I O N

Rendered on October 25, 2012

Jeffery K. Lucas, for appellants.

Isaac, Brant, Ledman & Teetor LLP, Mark Landes, and James M. Young, for appellees Scott Elliot Smith and Smith Phillips and Associates Co., LPA.

The Ohio State University, Elizabeth I Cooke, and Matthew S. Grimsley, Legal Intern, for appellee Leon Lively.

Ice Miller LLP, Susan Porter, and Angela Courtwright, for appellees Christina Corl, Esq. and Crabbe Brown & James LLP.

Reminger Co., LPA, Michael Romanello, and Melvin J. Davis, for appellees Todd Collis, Esq. and Collis, Smiles & Collis, LLC.

Organ Cole & Stock LLP, and Shawn J. Organ, for appellee Janet Phillips.

ON MOTION TO DISMISS

FRENCH, J.

{¶ 1} Pursuant to App.R. 3(A) and 15(A), purported appellee, Janet Phillips, moves this court to dismiss this appeal, which was filed by plaintiffs-appellants, Brandt Cook, Big Thumb, LLC, Highmark Advisors, LLC, Digital Spark Studio, LLC, and E-data Financial Serves, LLC (collectively, "appellants"), against Janet Phillips because appellants did not file a notice of appeal as to the trial court's dismissal of appellants' claims against her. Appellants have opposed Phillips' motion and have also moved for leave to amend their notice of appeal; Phillips and other appellees oppose that motion for leave. For the following reasons, we deny Phillips' motion to dismiss.

{¶ 2} Appellants filed this action against defendants-appellees, Scott Elliot Smith, Smith Phillips & Associates Co., LPA, Scott Elliot Smith, LPA, Jan[et] Phillips ("Phillips"), Leon Lively, Christina Corl, Crabbe Brown & James, LLP, Todd Collis, and Collis, Smiles & Collis, LLC (collectively, "defendants"), on December 14, 2010, and they filed a second amended complaint on August 3, 2011. On June 28 and 29, 2011, the trial court dismissed appellants' claims against the following defendants: Christina Corl; Crabbe Brown & James, LLP; Todd Collis; Collis, Smiles & Collis, LLC; and Leon Lively. On January 11, 2012, the trial court dismissed appellants' claims against defendants Scott Elliot Smith, Smith Phillips & Associates Co., L.P.A., and Scott Elliott Smith, LPA (collectively, the "Smith defendants"). As of that date, appellants' claims remained pending only against Phillips, whose motion to dismiss was pending before the trial court.

{¶ 3} On February 3, 2012, appellants filed a notice of appeal from "the orders dismissing the Plaintiffs' Complaint against the Defendants, as attached as Exhibit A * * *[,] and the final appealable order entered upon the record on January 11, 2012 and said order entered upon the record on January 30, 2012." The notice of appeal did not mention any defendant by name. Attached to the notice of appeal were the trial court's decisions and entries dated June 28 and 29, 2011, and January 11, 2012. No January 30, 2012 order was attached to the notice of appeal, nor does it appear from the docket that

the trial court issued any order on that date.¹ On March 12, 2012, this court dismissed appellants' appeal as premature because appellants' claims against Phillips, and Phillips' motion to dismiss, remained pending in the trial court. This court, therefore, remanded the matter to the trial court and ordered that "[t]he clerk of this court shall re-docket, with no additional filing deposit, the notice of appeal, on and after the trial court disposes of all claims as to all parties."

{¶ 4} On June 7, 2012, the trial court issued a final judgment entry, by which it granted Phillips' motion to dismiss for the same reasons it dismissed appellants' claims against the Smith defendants. The following day, the clerk of courts refiled appellants' previous notice of appeal and served it on all counsel of record, including Phillips' counsel. Because the clerk simply refiled the February 3, 2012 notice of appeal, as ordered by this court, the notice of appeal does not identify the trial court's June 7, 2012 judgment.

{¶ 5} Appellants claim that they attempted to e-file a second notice of appeal within 30 days of the trial court's final judgment entry. That notice of appeal, attached to appellants' memorandum contra Phillips' motion to dismiss this appeal, expressly claimed that appellants were appealing not only the rulings specified in the first notice of appeal, but also the trial court's June 7, 2012 ruling. For unknown reasons, however, the clerk of courts rejected that filing on July 9, 2012.

{¶ 6} The Ohio Rules of Appellate Procedure specify the means for perfecting an appeal from an adverse judgment. "An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4." App.R. 3(A). The timeliness of an appeal is determined by reference to App.R. 4(A), which requires a party to file a notice of appeal "within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its

¹ On January 24, 2012, the trial court granted defendants Christina Corl and Crabbe Brown & James, LLP's joint motion to strike appellants' second amended complaint and defendant Leon Lively's renewed motion to dismiss appellants' second amended complaint against him. The trial court held that the second amended complaint reasserted claims against these defendants that the court had already dismissed.

entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure."

{¶ 7} The timely filing of a notice of appeal is the only jurisdictional requirement for perfecting a valid appeal. *Transamerica Ins. Co. v. Nolan*, 72 Ohio St.3d 320 (1995), syllabus. "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal." App.R. 3(A). Thus, the Supreme Court of Ohio has held that "[w]hen presented with other defects in the notice of appeal, a court of appeals is vested with discretion to determine whether sanctions, including dismissal, are warranted, and its decision will not be overturned absent an abuse of discretion." *Transamerica* at 322.

{¶ 8} App.R. 3(D) sets forth the required content of a notice of appeal and states, in pertinent part, that "[t]he notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken." Phillips argues that the Ohio appellate rules mandate dismissal of appellants' appeal as to her because the notice of appeal does not designate the June 7, 2012 judgment, as required by App.R. 3(D). She contends that Ohio appellate courts consistently decline to review judgments or orders that are not specifically designated in a notice of appeal. On the other hand, appellants argue that, by filing a timely notice of appeal after the trial court entered its final judgment in this case, they have met the requirements of App.R. 3(A) and that this court should not dismiss their appeal of the judgment in favor of Phillips.

{¶ 9} In *Transamerica* at 322, the Supreme Court of Ohio treated a failure to comply with App.R. 3(D) as a "'step other than the timely filing of a notice of appeal'" and held that a failure to specifically identify all of the appellants, as required by that rule, was not a jurisdictional defect. Instead of naming each of the appellants, the notice of appeal in that case identified the appellants as "'Dennis Wallace et al.'" *Id.* at 321. The court of appeals held that the appellants' failure to comply with App.R. 3(D) by specifying the parties taking the appeal was a jurisdictional defect, but the Supreme Court reversed. The Supreme Court held that the court of appeals had discretion to

determine whether sanctions, including dismissal, were warranted as a result of a failure to comply with App.R. 3(D), and concluded that the court of appeals abused its discretion by refusing to consider the appeal of Linda Wallace, despite the absence of an express designation of her as an appellant in the notice of appeal. The Supreme Court stated that "[u]se of the term 'et al.' might not always be appropriate, but here appellees were not prejudiced by the use of the designation." *Id.* at 322.

{¶ 10} Phillips relies on several cases from the Eighth District Court of Appeals, which has held that a failure to designate the judgment or order appealed in a notice of appeal is a jurisdictional defect, precluding appellate review. *See, e.g., Sec. Fed. S. & L. Assn. v. Simon*, 8th Dist. No. 55971 (Mar. 16, 1989), quoting *Jordan v. Appelbaum*, 8th Dist. No. 46675 (Nov. 23, 1983) ("'[W]here an appellant indicates that he is only appealing from the first order or argument, the failure to indicate that an appeal is also being taken from a later order or judgment, precludes this court from acquiring jurisdiction to consider the matter.'"). The Eighth District, however, has not consistently applied that rule. For example, in *In re: S.G. & M.G.*, 8th Dist. No. 84228, 2005-Ohio-1163, ¶ 17, the court rejected such prior authority and stated as follows:

[I]t is the timely *filing* of the notice of appeal that is a jurisdictional prerequisite to this court's authority, not the *contents* of that notice. Indeed, a reviewing court is free to take whatever action it believes is appropriate, including dismissal of the appeal when a notice of appeal is defective under App.R. 3. When it does so, however, it is not because of any jurisdictional impediment, but as an exercise of its discretion under this rule.

(Emphasis sic.) *See also In re A.D.*, 8th Dist. No. 87510, 2006-Ohio-6036, ¶ 18-22, following *In re: S.G. & M.G.*; *In re A.C.*, 160 Ohio App.3d 457, 2005-Ohio-1742, ¶ 20 (8th Dist.) ("It is within the discretion of the appellate court to allow or disallow an appeal that lacks one of the prerequisites contained in App.R. 3(D)."). *But see Wallace v. Halder*, 8th Dist. No. 95324, 2011-Ohio-850, ¶ 9 (holding that it lacked jurisdiction to consider an assignment of error regarding an order not specified in the notice of appeal).

{¶ 11} This court has rejected the contention that a defect in a notice of appeal that has been timely filed from a final judgment defeats jurisdiction. In *Interstate Gas Supply, Inc. v. Callex Corp.*, 10th Dist. No. 04AP-980, 2006-Ohio-638, the appellees challenged this court's jurisdiction to consider an assignment of error as to a third-party defendant-appellee where the notice of appeal did not specify the portion of the trial court's judgment concerning that party. This court rejected the appellees' jurisdictional argument because the appellants timely filed their notice of appeal, but we nevertheless exercised discretion by considering whether the notice of appeal contained defects warranting dismissal. The "disputable" question concerned whether the notice of appeal indicated that appellants were appealing only the portion of the judgment concerning the plaintiff or whether they were also appealing the portion of the judgment in favor of the third-party defendant. *Id.* at ¶ 17. Upon consideration of the purpose of a notice of appeal, however, we concluded that the notice of appeal was not so defective to warrant dismissal, absent a showing of prejudice to the appellees, and that showing was lacking.

{¶ 12} In *Am. Chem. Soc. v. Leadscope*, 10th Dist. No. 08AP-1026, 2010-Ohio-2725, reversed in part on other grounds, ___ Ohio St.3d ___, 2012-Ohio-4193, this court was faced with a scenario in which the appellant filed a premature notice of appeal because a pending motion for attorney fees in the trial court precluded the trial court's ruling from being a final, appealable order. Pursuant to App.R. 4(C), the premature notice of appeal became effective when the trial court rendered its final appealable order. After the trial court rendered its final judgment, the appellant filed an amended notice of appeal, under the same appellate case number, which specified the final judgment. Thereafter, the appellant filed a motion for leave to amend its original notice of appeal to reflect the final judgment and to supplement the record with materials relating to attorney fees. Although this court granted the appellant's motion for leave to amend its notice of appeal, the appellees moved to vacate our order in that regard, arguing that the appellant failed to perfect an appeal from the trial court's final judgment, or at least from those aspects of the final judgment that did not incorporate rulings expressed in the trial court's prior orders.

{¶ 13} In *Am. Chem. Soc.*, at ¶ 18, this court set forth the appellees' multi-part argument as follows:

Initially, [appellees] argue a premature notice of appeal under App.R. 4(C) does not grant appellate jurisdiction over the trial court's eventual final order but only over the issues resolved in the interlocutory order, or prior orders subsumed in it, from which the appeal was prematurely taken. Secondly, defendants assert that in order to invoke appellate jurisdiction over the eventual final order, ACS was required to amend the premature notice of appeal under App.R. 3(F) to specifically designate, as App.R. 4(D) requires, the final judgment as the order being appealed. Thirdly, defendants contend ACS's amendment must be made within 30 days of the final order or the jurisdictional requirement of App.R. 4(A) is not met. Lastly, defendants maintain not only that ACS needed to seek and obtain leave from this court to amend ACS's notice of appeal, but that we lack the discretion to allow such amendment unless leave first is sought.

This court described the appellees' first three propositions as "debatable under Ohio law," but concluded that the fourth proposition, which this court rejected, was dispositive. *Id.* Because the appellant filed an amended notice of appeal that designated the trial court's final judgment within 30 days of that judgment, and because this court had discretion to allow the amendment, we stated that "[w]e need not consider whether we would have jurisdiction over the final order in the absence of any amendment to the premature notice of appeal or whether we could have allowed the amendment after 30 days had passed." *Id.* at ¶ 21. Here, appellant attempted to file a second notice of appeal within 30 days of the trial court's final judgment, but the clerk of courts did not accept the filing. Accordingly, we must consider some of the questions that remained unanswered in *Am. Chem. Soc.*

{¶ 14} Based on *Transamerica* and *Interstate Gas Supply*, we conclude that we have jurisdiction to consider appellants' appeal, including their appeal of the judgment in favor of Phillips, because appellants filed a timely notice of appeal from the trial court's final judgment, the only jurisdictional prerequisite for perfecting an appeal. This court has jurisdiction only to consider appeals from final, appealable orders. *George v. State*, 10th Dist. No. 10AP-4, 2010-Ohio-5262, ¶ 11; Ohio Constitution, Article IV,

Section 3(B)(2). Here, appellants' notice of appeal must be considered an appeal of the trial court's June 7, 2012 entry, as that was the only final appealable order issued below. Indeed, by dismissing appellants' first appeal, we recognized that the trial court's earlier rulings were interlocutory and not subject to appeal until the trial court issued a final judgment. "[A]ll interlocutory orders and decrees are merged into the final judgment, and as such, an appeal from the final judgment brings up all interlocutory rulings so merged with it." *Bard v. Soc. Natl. Bank*, 10th Dist. No. 97APE11-1497 (Sept. 10, 1998). Because appellants filed a timely notice of appeal from the trial court's final judgment, they complied with the requirements of App.R. 3(A), and this court has jurisdiction to consider their appeal.

{¶ 15} Cases in which this court has dismissed appeals based upon the notice of appeal are distinguishable. For example, in *Marcum v. Colonial Ins. Co. of Wisconsin*, 10th Dist. No. 02AP-917, 2003-Ohio-4369, this court dismissed an appeal from one of two consolidated cases where the appellant filed a single notice of appeal that listed only one of the two consolidated case captions and case numbers. The appellant admitted that she failed to file a notice of appeal in one of the cases, but argued that it was evident, based upon her assignments of error, that she intended to appeal the judgments in both cases. Because an appeal is perfected when a written notice of appeal is filed and because the time requirement for filing a notice of appeal under App.R. 4(A) is jurisdictional and may not be extended, this court concluded that the appellant failed to timely appeal the judgment in the case not listed in the notice of appeal. Each of the consolidated cases contained its own final appealable order, and the appellant did not file a timely notice of appeal from one of those judgments. Therefore, this court lacked jurisdiction to consider an appeal of the final judgment from which the appellant did not file a notice of appeal.

{¶ 16} In reaching its conclusion, this court distinguished *Natl. Mut. Ins. Co. v. Papenhagen*, 30 Ohio St.3d 14 (1987), in which the Supreme Court of Ohio reversed the dismissal of an appeal where the appellant filed a single notice of appeal from the trial court's joint judgment entry in consolidated cases, in violation of the local appellate court rule, but where the notice of appeal listed both case captions and both case

numbers and where the appellant promptly demonstrated that the error was inadvertent and in good faith. The Supreme Court held that the single notice of appeal, although contrary to the local appellate rule, "fulfilled its basic purpose of informing the parties and the court, in a timely manner, of appellant's intention of appealing a specified judgment." *Id.* at 16. In contrast, this court noted that, by listing only one of the consolidated case numbers in her notice of appeal, the appellant in *Marcum* informed the parties and the court of its intention to appeal only the judgment in the specified case.

{¶ 17} Here, we have a single case and a single, final appealable order. The notice of appeal was timely refiled within 30 days of the trial court's final order. Thus, we conclude that appellants' timely notice of appeal cloaks this court with jurisdiction over this appeal, including appellants' appeal of the trial court's dismissal of the claims against Phillips.

{¶ 18} Appellants filed a motion to amend their notice of appeal on August 24, 2012 to specify their intention of appealing the trial court's June 7, 2012 order, as well as the trial court's earlier June 29, 2011 and January 11, 2012 orders, which merged into the final judgment. On August 29, 2012, appellants filed an amended motion to amend their notice of appeal to reinstate a mistakenly omitted designation of one defendant as an "LPA." Phillips opposed appellants' motion to amend and argues that this court lacks discretion to grant the requested relief because more than 30 days had elapsed between the trial court's final order and appellants' motion to amend.

{¶ 19} Pursuant to App.R. 3(F), an appellate court has discretion to allow the amendment of a timely filed notice of appeal upon such terms as are just. In *Richards v. Indus. Comm.*, 163 Ohio St. 439, 449-50 (1955), quoting *In re Wisner's Guardianship*, 148 Ohio St. 31, 38 (1947), the Supreme Court of Ohio stated as follows:

"[T]his court has consistently been of the opinion that where the notice of appeal is filed in time in the lower court, the appeal is perfected, and all subsequent requirements, not being jurisdictional, can be amended to comply with the accurate facts in the interest of an expeditious and orderly trial of the merits of the particular case."

There, the appellant sought to amend the notice of appeal to specify the intention to appeal from an order overruling the appellants' motion for a directed verdict, as set forth in the assignments of error, in addition to an order granting the plaintiffs a new trial, as specified in the original notice of appeal. The Supreme Court concluded that the amendment "should have been allowed 'in the furtherance of justice.'" *Id.* at 450.

{¶ 20} In a recent case, this court denied a father's motion to amend his notice of appeal to include a second judgment. *See J.V.C.-N. v. M.P.D.*, 10th Dist. No. 11AP-581, 2012-Ohio-1418. There, the appellant moved to amend his notice of appeal, which referred only to a June 1, 2011 judgment that dismissed the appellant's pending motions for failure to prosecute. Appellant argued, in his motion to amend, that he also intended to appeal the trial court's June 30, 2011 judgment, by which the trial court ordered the appellant to pay child support, medical expenses, and attorney fees. This court stated, at ¶ 20, that "our jurisdiction over the June 30, 2011 judgment depends on whether there exists 'a timely filed notice of appeal' from that judgment." After noting that the appellant's notice of appeal and docketing statement, both filed after the June 30, 2011 judgment, unambiguously referred only to the June 1, 2011 judgment, this court stated that it would not construe the notice of appeal as a timely notice of appeal from the June 30, 2011 judgment. We stated that "the notice of appeal in this case was expressly sought to appeal from one judgment to the exclusion of another." *Id.* at ¶ 22. We held that, because the appellant did not file a timely notice of appeal from the June 30, 2011 judgment, there was no notice of appeal to amend.

{¶ 21} In the case before us now, this court granted appellants' amended motion to amend their notice of appeal on September 19, 2012, and we stand by that ruling. Numerous Ohio courts have permitted amendments to notices of appeal, or considered assignments of error stemming from rulings not specifically identified in the notices of appeal, in analogous situations. *See, e.g., S. Christian Leadership Conference v. Combined Health Dist.*, 191 Ohio App.3d 405, 2010-Ohio-6550 (2d Dist.) (allowing appeal of entire judgment of dismissal even though notice of appeal specified only one of two motions to dismiss); *Smith v. Inland Paperboard & Packaging, Inc.*, 11th Dist. No. 2007-P-0088, 2008-Ohio-6984 (considering assignment of error from trial court's

transfer of venue, even though that order was first designated in an amended notice of appeal filed outside the 30-day limit for noticing appeals); *Lawrence v. LTV Steel Co., Inc.*, 8th Dist. No. 77560 (Dec. 7, 2000) (granting motion to amend notice of appeal to challenge a discovery order).

{¶ 22} When presented with non-jurisdictional defects in a notice of appeal, as here, this court has discretion to determine whether sanctions, including dismissal, are warranted. "When presented with a notice of appeal that fails to comply with [the requirement that the notice designate the judgment or order being appealed], an appellate court must determine whether the notice served its intended purpose despite its defect." *Paasewe v. Wendy Thomas 5 Ltd.*, 10th Dist. No. 09AP-510, 2009-Ohio-6852, ¶ 10, citing *Maritime Mfrs., Inc. v. Hi-Skipper Marina*, 70 Ohio St.2d 257, 259-60 (1982). The purpose of a notice of appeal is to apprise the opposing party of the taking of an appeal. *Maritime Mfrs.* at 259. In determining whether dismissal is warranted, we may also consider other factors. For example, in *Transamerica*, the Supreme Court considered whether an appellant's mistake was made in good faith, whether prejudice arose as a result of the mistake, whether dismissal would constitute a disproportionate sanction, whether the client would be punished for counsel's action, and whether dismissal frustrated the overriding objective of deciding cases on their merits.

{¶ 23} Our dismissal of appellants' previous appeal made clear that appellants could only appeal from the trial court's final judgment, which would issue when the trial court resolved Phillips' motion to dismiss. Further, appellants' claims against Phillips were identical to their claims against the Smith defendants, and the trial court based its dismissal of the claims against Phillips on the same rationale it used to dismiss the claims against the Smith defendants. Phillips' counsel was served with appellants' notice of appeal, both when appellants originally filed it and again when the clerk of courts refiled it, after the trial court's final judgment. In addition to her knowledge that appellants were challenging the trial court's rationale for dismissing appellants' claims against her and the Smith defendants, Phillips admits that appellants' assignments of error put her on notice that appellants were challenging the trial court's dismissal of the claims against her. Given this court's dismissal of appellants' previous appeal for lack of

a final appealable order, the commonality of the claims against Phillips and the Smith defendants, the commonality of the trial court's rationales for dismissing those claims, and appellants' stated intent to challenge those rationales, we conclude that the notice of appeal included sufficient information to reasonably alert Phillips of the existence of appellants' appeal. Moreover, we agree with appellants that Phillips has suffered no prejudice or surprise, nor was she materially misled by the notice of appeal, as all defendants were on notice that appellants were challenging the trial court's dismissal of his claims on appeal.

{¶ 24} In conclusion, and for all these reasons, we overrule Phillips' motion to dismiss.

Motion to dismiss denied.

BRYANT and TYACK, JJ., concur.
