

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 1399

PATRICK WELLS, BETHANY WELLS, KELVIN WELLS,  
TREASURE WELLS

VERSUS

RASHAD HANNAH, PHILADELPHIA INSURANCE COMPANY, CHARTER  
SCHOOLS USA, SOUTH BATON ROUGE CHARTER SCHOOL,  
MONIQUE SMITH

*Handwritten initials: JWP and JVP*

**Judgment rendered April 6, 2018.**

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Appealed from the  
19<sup>th</sup> Judicial District Court  
in and for the Parish of East Baton Rouge, Louisiana  
Trial Court No. C650790  
Honorable Donald Johnson, Judge

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KELVIN WELLS  
BATON ROUGE, LA

PRO SE  
PLAINTIFF-APPELLANT  
KELVIN WELLS, NATURAL TUTRIX OF  
PATRICK WELLS, BETHANY WELLS,  
AND TREASURE WELLS

C. DAVID VASSER, JR.  
BATON ROUGE, LA

ATTORNEY FOR  
DEFENDANTS-APPELLEES  
PHILADELPHIA INSURANCE  
COMPANY, CHARTER SCHOOLS USA,  
INC., SOUTH BATON ROUGE  
CHARTER SCHOOL ACADEMY, AND  
MONIQUE SMITH

JAMES C. DONOHUE  
DAVID F. ZUBER  
RACHEL S. DAY  
BATON ROUGE, LA

ATTORNEYS FOR  
DEFENDANT-APPELLEE  
RASHAD HANNAH

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**BEFORE: GUIDRY, PETTIGREW, AND CRAIN, JJ.**

*Handwritten signature: Crain, J concurs*

**PETTIGREW, J.**

In this case, the plaintiffs sought an appeal from an unspecified judgment of the trial court shortly after three separate judgments were signed. Due to discrepancies between the plaintiffs' motion and order for appeal and the Notice of Appeal issued by the Clerk of Court to the parties, as well as the apparent signing of multiple judgments on the same ruling, we remand this matter to the trial court for further action consistent with this opinion and for supplementation of the record.

**FACTS AND PROCEDURAL HISTORY**

This matter stems from an incident which allegedly occurred at South Baton Rouge Charter Academy<sup>1</sup> between Rashad Hannah, an employee of the school, and ten-year-old Patrick Wells, a student at the school. Kelvin Wells, Patrick's father, filed a petition in proper person in the 19<sup>th</sup> Judicial District Court, on August 22, 2016, for damages arising out of the alleged incident on behalf of himself, Patrick's mother, and his other two minor children.<sup>2</sup> Mr. Wells requested service of his petition for damages on defendants, Philadelphia Insurance Company, Monique Smith, Rashad Hannah, South Baton Rouge Charter Academy, and Charter Schools USA; however, his request to proceed in forma pauperis was denied by the trial court on August 25, 2016, and his request for supervisory review of the denial of his request for pauper status was denied by this court on December 1, 2016.

Philadelphia Insurance Company, Monique Smith, South Baton Rouge Charter Academy, and Charter Schools USA (collectively referred to herein as "the School Defendants"), filed a declinatory exception of insufficiency of citation and insufficiency of service of process on September 26, 2016, along with exceptions of lack of procedural capacity and no cause of action. Rashad Hannah filed the same exceptions on November 10, 2016.

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<sup>1</sup> South Baton Rouge Charter Academy was incorrectly named in the petition as "South Baton Rouge Charter School."

<sup>2</sup> The plaintiffs were represented by attorney Nghana Gauff in this matter, but Ms. Gauff filed a motion to withdraw after Mr. Wells filed the original petition in proper person.

A hearing was held on all exceptions on December 12, 2016, and the trial court signed a judgment on December 19, 2016, granting defendants' declinatory exceptions of lack of service of process and lack of citation and ordering Mr. Wells to perfect service of process within 45 days. The trial court instructed Mr. Wells that if he failed to perfect service within 45 days, "the plaintiffs' action shall be deemed dismissed, with prejudice."<sup>3</sup> Mr. Wells filed a second request to proceed in forma pauperis, which was granted by the trial court on December 12, 2016, after his attorney was allowed to withdraw.

Mr. Wells sent an "Expedited Request for Service" to the East Baton Rouge Parish Clerk of Court on January 12, 2017, requesting service of the petition for damages on defendants and counsel of record. The Clerk of Court sent a form letter response to Mr. Wells on January 19, 2017, stating that Mr. Wells was required to make an advance deposit in the amount of \$480.00. Mr. Wells returned a photocopy of the form letter to the Clerk's Office with a note stating, "Please check pauper [sic] signed December 12, 2016." Mr. Wells also filed an Amended Petition for Damages on January 26, 2017, and a 2<sup>nd</sup> Amended Petition for Damages on February 1, 2017, and requested service of both amended petitions on defendants.

On February 24, 2017, Mr. Wells filed a "Petition for Writ of Mandamus, Expedited" with this court, asserting that despite having been granted pauper status on December 12, 2016, the East Baton Rouge Parish Clerk of Court "has returned each pleading and not processed and served Pleadings," and asking this court to instruct the Clerk of Court to comply with the pauper order and allow Mr. Wells to proceed without advance payment of costs. Shortly thereafter, the East Baton Rouge Parish Clerk of Court corrected the apparent error as to Mr. Wells' pauper status and filed and served the pleadings, and the writ was denied by this court on May 25, 2017.<sup>4</sup>

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<sup>3</sup> The judgment also granted the Wells' attorney's motion to withdraw, denied the dilatory exception of lack of procedural capacity, and granted the peremptory exception of no cause of action, ordering Mr. Wells to amend his petition to state a cause of action on the parts of Treasure Wells and Bethany Wells within 45 days.

<sup>4</sup> **Wells v. Hannah**, 17-0249 (La.App. 1 Cir. 5/27/17), 2017WL2295027 (unpublished writ action).

None of the School Defendants were served with the original or amended petitions until at least March 10, 2017. Rashad Hannah was never served personally with the original or amended petitions, although service was made on March 17, 2017 on his attorney. The School Defendants filed a second declinatory exception with the trial court on March 30, 2017, objecting to the lack of timely service of process and citation and requesting dismissal from the suit. The exceptions were first set for hearing on May 22, 2017, then continued to July 17, 2017. Rashad Hannah filed his own declinatory exception of insufficiency of service of citation and process on May 16, 2017, alleging that Mr. Wells failed to ever perfect service on him personally or by domiciliary means. Mr. Hannah's exception was also set for hearing on July 17, 2017.

Mr. Wells subsequently filed a Motion for Default Judgment on May 18, 2017, alleging that defendants were served with the original petition, but failed to answer within the time allowed. A preliminary default was entered by the duty judge on May 26, 2017.

Rashad Hannah filed a "Motion to Vacate and Set Aside or, Alternatively, Annul Entry of Preliminary Default Judgment" on June 2, 2017, alleging that the preliminary default was improperly entered since he had never been served and his declinatory exception was still pending. The School Defendants filed their own "Motion to Vacate Improperly Obtained Preliminary Default Judgment" on June 5, 2017, alleging that their pending declinatory exceptions legally precluded a preliminary default. Both motions to vacate the default judgment were set for July 17, 2017.

On June 22, 2017, Mr. Wells filed a motion seeking to have the trial court confirm the default judgment against the defendants. This motion was not acted upon by the court.

A hearing was held on July 31, 2017<sup>5</sup> on the declinatory exceptions and motions to vacate the preliminary default judgment filed by the School Defendants and Rashad Hannah. After argument by the parties, the trial court vacated the preliminary default

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<sup>5</sup> The hearing on the motions and exceptions scheduled for July 17, 2017 was continued at Mr. Wells' request.

judgment, took the declinatory exceptions under advisement, and instructed the parties to submit proposed judgments granting the motion to vacate and also to submit proposed judgments on the declinatory exceptions. The trial court signed a judgment entitled "Judgment Vacating Improperly Obtained Preliminary Default" on August 3, 2017, which states that the motion filed on behalf of the School Defendants and Rashad Hannah is granted and the May 26, 2017 preliminary default judgment is vacated, "consistent with the oral ruling at the hearing." The trial court signed a separate judgment on the same day granting the declinatory exceptions filed on behalf of the School Defendants and Rashad Hannah and dismissing all claims with prejudice. Inexplicably, the trial court signed another judgment on August 10, 2017, entitled "Judgment Vacating Improperly Obtained Preliminary Default," which states that "consistent with the oral ruling at the hearing," the motion filed by the School Defendants (no mention of Rashad Hannah) is granted and the preliminary default judgment entered on May 26, 2017 is vacated. The August 3, 2017 and August 10, 2017 judgments vacating the default judgment are identical except for the omission of Rashad Hannah's name in the August 10, 2017 judgment.

Mr. Wells filed a motion for appeal (styled "Notice of Appeal") on August 16, 2017, which did not specify which judgment he intended to appeal, but stated:

Under an abundance of caution, Plaintiffs object to ruling of this Court as it relates to the granting of motion to vacate and or annul judgement [sic] of preliminary default. Plaintiffs show and contend that they were denied access and service upon initial request for service simply because they lacked ability to pay costs assessed even thouth [sic] pauper had been granted. . . .

Plaintiffs pray that this Court correct its error after reviewing the record in these matters as preliminary default was rightfully obtained. If Court declines to do so, Plaintiffs further Pray for Appeal and or gives this Court Notice of Intent to Seek Writs.

The order granting Mr. Wells' appeal was signed on August 21, 2017, but does not specify which judgment was appealed; it simply states: "CONSIDERING THE FOREGOING: IT IS HEREBY ORDERED THAT Plaintiff(s) is Granted Appeal returnable to the Court of Appeal within applicable delays fixed by law." However, the Notice of Appeal issued by the East Baton Rouge Parish Clerk of Court states that upon Mr. Wells' motion,

“an order of appeal was entered granting a DEVOLUTIVE appeal from the judgment of AUGUST 10, 2017.”

In his brief to this court, Mr. Wells states that “A timely appeal of judgement [sic] granted by the trial [court] on August 03, 2017 was filed by Plaintiffs objecting [to] vacation of Default Judgement [sic] and granting of exceptions.” Mr. Wells’ brief contains arguments related to both the vacated preliminary default judgment and the dismissal of his suit pursuant to the declinatory exceptions.

Rashad Hannah points out in his appellate brief that “[f]rom the Notice of Appeal filed by the Appellants, it appears the Appellants are seeking an appeal from the trial court judgment’s granting the Appellees’ Motion to Vacate the Preliminary Default Judgment only.” However, out of an abundance of caution since Mr. Wells mentioned the declinatory exceptions in his appellate brief, Mr. Hannah addressed Mr. Wells’ arguments related to the declinatory exceptions as well. The School Defendants’ brief refers only to the August 10, 2017 judgment vacating the preliminary default and the December 19, 2016 judgment granting the declinatory exceptions. Although the School Defendants’ brief does not specifically mention the August 3, 2017 judgment granting the reurged declinatory exceptions and dismissing plaintiffs’ claims, it does state that there was no error in the judgment “dated August 10, 2017 . . . confirming the dismissal of this suit for failure to timely have each (or any) defendant served with citation or process in this suit.”

### **DISCUSSION**

It appears to be unclear to the parties, as it is to this court, exactly which judgment or judgments are being appealed. Furthermore, it is unclear why the trial court signed a second judgment on August 10, 2017, vacating the preliminary default on motion of the School Defendants, when the trial court had signed an almost identical judgment on August 3, 2017, vacating the preliminary default on motion of all defendants.

Mr. Wells’ motion for appeal did not identify the date of the judgment he wished to appeal, nor did the order granting the appeal identify the judgment appealed. Nevertheless, in the motion for appeal, Mr. Wells asked for reconsideration of the

judgment vacating the preliminary default and also argued that he was improperly denied service of his pleadings. Although vague, this could reasonably be interpreted as a request for an appeal from both the judgment vacating the preliminary default and the judgment granting the declinatory exceptions. However, the notice issued by the East Baton Rouge Parish Clerk of Court to the parties stated that plaintiffs were granted an appeal only from the judgment of August 10, 2017. Rashad Hannah's brief expressed uncertainty as to exactly which judgment was being appealed, although his brief addressed both the judgment vacating the preliminary default and the judgment granting the declinatory exceptions, and he does not mention the omission of his name from the August 10, 2017 judgment. The School Defendants' brief addressed all issues raised by Mr. Wells' brief as well.

Appeals are favored in the law, must be maintained wherever possible, and will not be dismissed for technicalities. **Smith v. Hartford Acc. & Indem. Co.**, 254 La. 341, 349, 223 So.2d 826, 829 (La. 1969). Louisiana Code of Civil Procedure article 2161 provides that an appeal shall not be dismissed because the trial record is missing, incomplete, or in error, no matter who is responsible, and the court may remand the case either for retrial or for correction of the record. An appeal shall not be dismissed because of any other irregularity, error, or defect, unless it is imputable to the appellant. Where appellant's intent to appeal an unfavorable judgment is apparent, but appellant inadvertently misidentifies the judgment in the motion for appeal, the appeal of the intended judgment will not be dismissed based on technicalities, where the appellee is not prejudiced by the misidentification. See **Smith**, 254 La. at 345-49, 223 So.2d at 827-29; **State, Dept. of Transp. & Development v. Estate of Summers**, 527 So.2d 1099, 1101-02 (La.App. 1 Cir. 1988); **King v. King**, 253 So.2d 660, 662 (La.App. 1 Cir. 1971), **writ denied**, 260 La. 128, 255 So.2d 353.

For the foregoing reasons, we remand this matter to the trial court to conduct a contradictory hearing to determine which judgment or judgments have been properly appealed, to clarify the purpose of the August 10, 2017 judgment in favor of the School Defendants only, to issue an amended order of appeal identifying the judgment or

judgments appealed, and to supplement the record on appeal with the amended order of appeal within forty-five days.

**DECREE**

This matter is remanded to the trial court for further proceedings as set forth herein and for supplementation of the record of this appeal within forty-five (45) days. Assessment of appellate costs will await final resolution of this appeal.

**REMANDED FOR FURTHER PROCEEDINGS AND SUPPLEMENTATION OF RECORD.**