[Cite as *Cireddu v. Clough*, 2012-Ohio-4338.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

JAMES V. CIREDDU, et al.,	:	**MEMORANDUM OPINION**
Plaintiff-Appellant,	:	**CASE NO. 2012-L-048**
- vs -	:	
STEPHANIE Y. CLOUGH,	:	
Defendant-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Juvenile Division, Case No. 2008 CV 02029.

Judgment: Appeal dismissed.

Hans C. Kuenzi, Hans C. Kuenzi Co., L.P.A., 1660 W. Second Street, Suite 410, Cleveland, OH 44113 (For Plaintiff-Appellant).

Stephanie Y. Clough, pro se, 8060 Wright Road, Broadwater Heights, OH 44147 (Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} The present matter is before this court on appellee, Stephanie Clough's, July 9, 2012 Motion to Dismiss Appeal. Appellant, James Cireddu, filed a response on July 13, 2012.

{¶2} In support of her Motion to Dismiss, Clough argues that this court has already ruled on and affirmed the Judgment Entry from which Cireddu appeals.

{¶3} In a previous appeal, on September 9, 2011, Cireddu filed a Notice of Appeal from a judgment issued by the trial court on August 16, 2011, which granted

Clough's Motion to Vacate Judgment Entry and Renewed Motion for Reconsideration, and found that the motion to change the surname of the minor children before the trial court had been "litigated and decided by the magistrate."

{¶4} In an April 11, 2012 Judgment Entry, this court found that the trial court's August 16 Judgment Entry was not a final order because, although it stated that the surname issue had been decided by the magistrate, it did not enter final judgment on the Magistrate's Decision or state that it was adopting such order. This court, sua sponte, remanded the case to the trial court for 15 days for the purpose of issuing a judgment that was a final appealable order.

{¶5} On April 18, 2012, the trial court issued a Judgment Entry on remand, finding the Magistrate's Decision, denying Cireddu's request for a change in the children's surname, to be "proper in all respects" and adopting the Decision in full. The court also stated that the Plaintiff's Objection to the Magistrate's Decision, was not well taken and ordered that the request to change the children's surname "is not well taken and is hereby denied."

{¶6} Subsequently, in *Cireddu v. Clough*, 11th Dist. No. 2011-L-121, 2012-Ohio-2242, this court reviewed the Entry issued upon remand, considered the assignments of error raised by Cireddu, and affirmed the decision of the court below. It found that the trial court did not abuse its discretion in determining that no further hearing was required on the matter of the surname issue and that the magistrate fully considered the surname issue. This court affirmed the trial court's ruling that there was not sufficient evidence presented to show that a change in surname was warranted and that Cireddu was not entitled to another evidentiary hearing to prove the merits of his motion. *Id.* at ¶ 27.

{¶7} In addition, this court addressed Cireddu's assertion that the trial court left unresolved his objection to the Magistrate's Decision and found that on remand, the trial court's Judgment Entry properly adopted the Magistrate's Decision and explicitly ruled on Cireddu's May 21, 2010 Objection to the Magistrate's Decision, finding it to be not well taken and overruled. *Id.* at ¶ 31.

{¶8} Regarding the Motion to Dismiss presently before this court, Clough argues that since this court has already ruled on errors related to the April 18, 2012 Judgment Entry of the trial court, Cireddu cannot take another appeal from that same Judgment Entry before this court.

{¶9} Cireddu argues that different arguments were raised in the prior appeal and that additional issues were raised by the trial court's Entry issued upon remand.

{¶10} An appellate court has "jurisdiction upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments or final orders of courts of record inferior to the court of appeals within the district." R.C. 2501.02; Ohio Constitution, Article IV, Section 3(B)(3).

{¶11} It has been generally held by various courts that the right to appeal to an appellate court from a judgment entry or order does not include multiple attempts to appeal from the same entry. *Marino v. Painter*, 11th Dist. No. 2003-T-0133, 2004-Ohio-6033, ¶ 19 ("there is no right to a second appeal"), citing *Irwin v. Lloyd*, 65 Ohio St. 55, 61, 61 N.E. 157 (1901); *Hoisington v. Jones*, 10th Dist. Nos. 89AP-720 and 89AP-743, 1990 Ohio App. LEXIS 424, *7 (Feb. 6, 1990) ("the law does not allow or provide for" a second appeal from an order or entry of the trial court). It logically follows that, if there is no right to a second appeal from the same entry to an appellate court, this court has

no jurisdiction to consider Cireddu's appeal and his assignments of error, regardless of whether they are different than the ones raised in the prior appeal.

{¶12} While Cireddu filed his original notice of appeal from the trial court's August 16, 2011 Judgment Entry instead of the April 18 Entry issued upon remand, the April 18 Entry was the only one considered by this court when addressing the merits of his appeal, as was noted several times in the *Cireddu* opinion. As this court has found previously, an appeal can be considered premature if taken from a non-final order and, after a remand, the appeal will be considered as taken from the final order issued by the trial court. *See Sullivan v. Howard,* 11th Dist. No. 2010-L-102, 2011-Ohio-2329, ¶ 13 (case was remanded to the trial court for issuance of a final order and the notice of appeal was deemed taken from that order). Allowing Cireddu to file an additional notice of appeal would open the door for all parties to file separate notices of appeal in such cases and would not be a proper allocation of court time and resources.

{¶13} The concurrence agrees that Cireddu's initial notice of appeal must be deemed as filed from the April 18, 2012 Judgment Entry, pursuant to App.R. 4(C), but asserts that this court should give appellants notice on occasions when their appeals will be considered premature. However, there is no rule or case law to support such a requirement. As stated by the concurrence, App.R. 4(C) is self-executing, in that it applies automatically upon issuance of a final order by the trial court. Appellants before this court should be aware of all pertinent appellate rules and, therefore, should not rely on the appellate court to instruct them as to which rules are applicable to their appeals.

{¶14} In the present matter, Cireddu had adequate notice of the fact that his appeal from the trial court's original August 16, 2011 Entry could not proceed before this court, as this was made clear in this court's Entry remanding the matter to the trial court

for the issuance of a final order. Cireddu had sufficient notice of the finality issue, through both this Entry and the trial court's issuance of the April 18, 2012 Judgment Entry, but failed to take any further action during the prior appeal. Moreover, there should not have been any "misapprehension" of the law by Cireddu, as argued by the concurrence, since the law is clear both as to the nature of premature appeals and as to the fact that appellants cannot file more than one notice of appeal from the same judgment entry.

{¶15} Finally, while Cireddu now argues that he did not brief or raise issues specific to the Entry issued on remand, as noted above, he could have filed supplemental briefing or assignments of error prior to both oral argument or the release of the opinion, which he failed to do. Moreover, the trial court did not make any additional factual findings upon remand to which Cireddu was unable to respond in the prior appeal, such that dismissal of the present appeal would be unfair.

{¶16} Accordingly, Clough's Motion to Dismiss is granted, since Cireddu has already appealed from the April 18, 2012 Judgment Entry, and the judgment of the lower court has been affirmed.

{¶17} Appeal dismissed.

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in judgment only with a Concurring Opinion.

TIMOTHY P. CANNON, P.J., concurring in judgment only.

{¶18} I concur with the majority that this appeal must be dismissed, but I reach this conclusion for a different reason.

{¶19} The cases cited by the majority simply have no application to this case. *Marino v. Painter*, 11th Dist. No. 2003-T-0133, 2004-Ohio-6033 involved a voluntary dismissal of a prior appeal, which operated as a dismissal "with prejudice." *Hoisington v. Jones*, 10th Dist. Nos. 89AP-720 & 89AP-743, 1990 Ohio App. LEXIS 424 (Feb. 6, 1990) held that a Civ.R. 60(B) motion cannot be used as a substitute for an appeal. Neither of these matters is at issue here.

{¶20} App.R. 4(C), titled "premature notice of appeal," provides: "[a] notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry." Here, appellant's original notice of appeal was filed (long) before the final entry of judgment that otherwise would begin the running of the 30-day appeal time period. Given the language used, it appears the rule is self-executing in establishing a new date for the original notice of appeal. Therefore, pursuant to App.R. 4(C), appellant's initial notice of appeal "is treated as filed immediately after" the April 18, 2012 order. Thus, appellant's attempt to file an additional notice of appeal on May 15, 2012, had no legal effect since he had already filed one, by operation of the rule, on April 18, 2012.

{¶21} This result is somewhat troubling as App.R. 4(C) does not seem to contemplate appellate courts sua sponte remanding cases to obtain a final, appealable order to serve the interests of judicial economy. The consequences are obvious in this case: appellant was under the impression he could file a timely appeal from the entry as

of right, pursuant to App.R. 3(A) and App.R. 4(A). Although not required, this could have been avoided if, on remand, the judgment entry referenced the application of App.R. 4(C) and/or stated the appeal was premature. Indeed, in *Sullivan v. Howard*, 11th Dist. No. 2010-L-102, 2011-Ohio-2329, ¶13, which the majority has noted, the remand entry stated that the appellant's "'Notice of Appeal filed August 26, 2010, *will be considered a premature appeal* as of December 27, 2010, *pursuant to App.R. 4(C)* and shall proceed according to the Ohio Rules of Appellate Procedure.'" (Emphasis added.)

{¶22} Here, appellant was afforded no such notice in the remand order that his appeal would be considered premature and that his prior notice of appeal was, in actuality, now appealing the final, appealable order obtained from this court's remand. Nonetheless, appellant was not completely without remedy. If either party or this court determined the final entry was substantively different or raised additional issues than those considered during briefing and argument, additional briefing could have been requested or ordered.