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You got to have appellate jurisdiction

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"Because appellate jurisdiction should be defined in as mechanical a fashion as possible, both to enable parties to know when they must appeal and to prevent jurisdictional disputes from overwhelming the disputes on the merits, we stop at the starting place." *Federal Deposit Ins. Corp. v. Elefant*, 790 F.2d 661, 664 (7th Cir. 1986).

"Appellate jurisdiction ought to be determined mechanically, without guessing at the district judge's expectations." *Hoskins v. Poelstra*, 320 F.3d 761, 763 (7th Cir. 2003) citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-203 (1988).

The attempt to mechanically determine appellate jurisdiction was on full display during three oral arguments before the 7th U.S. Circuit Court of Appeals on Nov. 10, as the advocates were questioned closely on whether there was appellate jurisdiction in their case and in one case leading to supplemental briefing on the issue.

In *Michael Shakman v. Clerk of Cook County*, the district court, in considering a consent decree entered in 1991 and then revived in 2018 when a new clerk was elected, denied the defendant's request for relief under Rule 60(B)(5) that was part of a response to the motion filed by the plaintiff. The court questioned whether it had appellate jurisdiction because no freestanding Rule 60(B) motion was filed and ruled on, and was unsatisfied with the explanations from counsel for the appellant that the substance of what the district court did could control over the form of what was considered and ruled on by the district court.

In the argument on *Notre Dame Affordable Housing v. City of Chicago*, Judge Frank H. Easterbrook, in questioning whether there was appellate jurisdiction, proposed two options on how a dismissal without prejudice followed by a docket entry terminating the matter could be interpreted (1) that the matter could be pursued in state court for which Article III standing would not be an issue and (2) that the plaintiff may replead in federal court. One would seem to confer jurisdiction and the other would not.

Building on an admonition from then Chief Judge Diane P. Wood earlier this year regarding the need to have explicit consent to a magistrate from all parties to enter a final judgment in order for there to be appellate jurisdiction, in *Marion HealthCare, LLC. v. Southern Illinois Healthcare*, the panel questioned whether it had appellate jurisdiction. That admonition came in the form of an email to every 7th Circuit filer and referenced two cases that had been consolidated because the consent to the magistrate was not clear and gave the parties time to file the date and proof of consent. *Lowrey v. Tilden*, 948 F.3d 759 (7th Cir. 2020).

In *Lowrey*, Wood wrote, "This court takes jurisdictional issues seriously — indeed, it is proud to have a reputation as a jurisdictional hawk. As part of our routine procedure, we screen all briefs filed before oral argument or submission on the briefs to ensure that our jurisdiction is secure and to catch any potential problems."

This follows on *Baez-Sanchez v. Sessions*, 826 F.3d 638 (7th Cir. 2017), in which the court stated, "[T]he problem was the failure on the part of many appellees to specify precisely whether, in counsel's view, the appellant's jurisdictional statement was *complete* and *correct*. I emphasized that these are different requirements." (Emphasis in original.)

In *Marion*, a defendant was granted summary judgment and then an amended complaint was filed in which the dismissed defendant was not named. The magistrate then entered judgment on the amended complaint in favor of the remaining defendants without consent to the magistrate from the previously dismissed defendant. Simply not being named in the amended complaint did not mean that the dismissed defendant ceased to be a party requiring consent and the appellees' attempt to contend that the previously dismissed defendant had impliedly consented to the magistrate seemed to fare little better. The court ordered supplemental briefing on the issue and pointed the parties to *Coleman v. Labor & Industrial Review Commission of Wisconsin*, 860 F.3d 461 (7th Cir. 2017).

If what occurred in *Marion* had occurred in Illinois state court, there likely would be no question that the previously dismissed defendant was no longer a party at the time of the entry of the judgment as to the remaining defendants, even in the absence of a Rule 304(a) finding, because the plaintiff abandoned those claims against that defendant by not pleading those claims and thus failing to preserve them for appeal. *Foxcroft Townhome Own. Ass'n v. Hoffman Rosner Corp.*, 96 Ill.2d 150, 154 (1983).

Problems of appellate jurisdiction are not limited to the 7th Circuit. Appellate jurisdiction is nothing to be trifled with in both federal and state court, and it should be of concern to both plaintiffs' counsel and defense counsel. But it must be done properly.

In *Allen v. Leckie*, 2019 IL App (1st) 180957-U, the court held that in order to confer appellate jurisdiction, the trial court must make the finding that there is no just reason to delay enforcement or appeal of the order. "A circuit court order accompanied by language indicating that it is 'final and appealable,' but not referencing immediate appeal, the justness of delay, or Rule 304(a), does not trigger the rule" and "absent some other indication from the record that the court intended to invoke Rule 304(a), a circuit court's declaration that an order is 'final and appealable' amounts to nothing more than a nonbinding interpretation." *Allen*, 2019 IL App (1st) at Para. 37. For other problems with Rule 304(a) findings see *The Newport Condominium Association v. Blackhall Corporation 401(K) PSP*, 2020 IL App (1st) 191717-U and *Mayle v. Urban Realty Works*, 202 IL App (1st) 191018.

Seeking finality to make appellate jurisdiction clear should be at the top of mind of counsel. In addition, trial courts should be more amenable to Rule 54(B) and Rule 304(a) findings so that the resources of the dismissed party are not wasted otherwise that party languishes in a kind of purgatory. Failing to properly confer appellate jurisdiction wastes everyone's resources, especially time, and the lessons of these recent arguments and cases should be heeded.
