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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-19

Filed 5 December 2023

Cumberland County, No. 20 JA 287

IN THE MATTER OF: L.M.

Appeal by respondent-mother from order entered 23 September 2022 by Judge Frances M. McDuffie in Cumberland County District Court. Heard in the Court of Appeals 9 October 2023.

Dawn M. Oxendine, for petitioner-appellee Cumberland County Department of Social Services.

Nelson Mullins Riley & Scarborough, LLP, by Chelsea K. Barnes, for guardian ad litem.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender J. Lee Gilliam, for respondent-appellant mother.

GORE, Judge.

Respondent-mother appeals from a permanency planning order awarding guardianship to the child's maternal aunt. Because respondent failed to serve her notice of appeal on all parties in compliance with Rule of Appellate Procedure 3.1, we dismiss.

I. Background

In September 2020, respondent and her son, Liam,¹ lived alone together in Fayetteville, North Carolina. On 15 September 2020, the Cumberland County Department of Social Services (“DSS”) filed a petition alleging Liam was a neglected juvenile. The facts that led to this petition and adjudication are not at issue in this appeal. Liam was also taken into nonsecure custody by DSS on 15 September 2020. At some point between 15 September 2020 and 21 September 2020, Liam was appointed a guardian *ad litem* (“GAL”).²

Liam was adjudicated a neglected juvenile on 5 November 2021. The trial court held a separate dispositional hearing and entered a written order on 9 March 2022. The court found DSS had placed Liam with his maternal aunt, Liam was doing well in his current placement, and that Liam should only visit with respondent in a therapeutic setting. Liam remained in the legal and physical custody of DSS.

The trial court held the first permanency planning hearing on 2 May 2022 and entered a written “Review and Initial Permanency Planning Order” on 28 June 2022. The trial court found Liam was still placed with his aunt and was doing well in his placement. The trial court also found Liam’s putative father was “no longer participating in the case[,]” and had not completed a DNA test to establish paternity

¹ A pseudonym for the minor child is used throughout this opinion.

² Liam was represented by a GAL throughout these proceedings, but the record on appeal does not indicate when he was first appointed a GAL.

as previously ordered.³ The trial court then found respondent was “not making adequate progress within a reasonable period of time to achieve reunification[;]” respondent was not a “fit or proper person[] for the continued care, custody, or control of” Liam; and it was “not possible for [Liam] to be placed with a parent within the next six (6) months and such placement [wa]s not in [Liam’s] best interest.” The court relieved DSS of reunification efforts and set a primary permanent plan of guardianship with a secondary plan of custody “with a relative or other suitable person.”

The trial court held a second permanency planning hearing on 5 July 2022 and entered a written “Permanency Planning Order and Order Waiving Further Reviews” (“Permanency Planning Order”) on 23 September 2022. The court made similar findings to those in the first permanency planning order and also found Liam’s aunt was willing to be a permanent guardian. The trial court concluded guardianship was in Liam’s best interests and awarded Liam’s aunt guardianship pursuant to N.C. Gen. Stat. § 7B-600. The trial court also decreed Liam’s aunt “is hereby a party to this action.” The trial court waived further review hearings.

On 8 July 2022, between the permanency planning hearing and the trial court’s entry of the Permanency Planning Order, the trial court released Liam’s GAL and allowed the GAL attorney advocate to withdraw upon entry of the Permanency

³ The trial court initially ordered the putative father to provide a DNA sample on 1 March 2021.

Planning Order because a permanent plan had been achieved. There is no indication in the record the GAL attorney advocate withdrew after the Permanency Planning Order was entered.

On 26 September 2022, respondent filed a notice of appeal from the Permanency Planning Order. Respondent filed an amended notice of appeal correcting the DSS attorney's name on 27 September 2022. Both notices of appeal were served on the DSS attorney and the GAL attorney advocate, but not Liam's guardian. During the pendency of this appeal the proposed record on appeal, settled record on appeal, and all three briefs submitted in this matter were served on Liam's guardian.

II. Notice of Appeal

The dispositive issue in this appeal is whether respondent's appeal is subject to dismissal because respondent did not serve her notice of appeal on Liam's guardian. This Court has the "discretionary 'authority to promote compliance with the appellate rules[.]'" *Mughal v. Mesbahi*, 280 N.C. App. 338, 343 (2021) (quoting *Dogwood Dev. and Mgmt. Co., v. White Oak Transp. Co.*, 362 N.C. 191, 199 (2008)); see also N.C.R. App. P. 25(b) ("A court of the appellate division may, on its own initiative . . . impose a sanction against a party . . . when the court determines that such party . . . substantially failed to comply with these rules[.]").

Rule of Appellate Procedure 3.1(b) provides "[a]ny party entitled to an appeal" under Chapter 7B must "serv[e] copies of the notice of appeal on all other parties."

Chapter 7B provides guardians are automatically made parties to an action once appointed if guardianship is the permanent plan for the juvenile. N.C.G.S. § 7B-401.1(c) (2021) (“A person who is the child’s court-appointed guardian . . . pursuant to G.S. 7B-600 shall automatically become a party but only if the court has found that the guardianship is the permanent plan for the juvenile.”); N.C.G.S. § 7B-600(b) (2021) (“In any case where the court has determined that the appointment of a . . . guardian of the person for the juvenile is the permanent plan for the juvenile and appoints a guardian under this section, the guardian becomes a party to the proceeding.”). Thus, once guardianship is established as the permanent plan for a juvenile, an appellant must serve notice of appeal on a guardian appointed under Chapter 7B for any future appeals because that guardian is a party to the underlying proceeding appealed from.

The trial court set the permanent plan for Liam as guardianship and appointed Liam’s aunt his guardian; as his appointed guardian, Liam’s aunt automatically became a party by operation of law. *See* N.C.G.S. § 7B-401.1(c); N.C.G.S. § 7B-600(b). The trial court also explicitly decreed Liam’s aunt to be a party to the Chapter 7B proceeding upon entry of the order. However, respondent served her notice of appeal on DSS and the GAL but not Liam’s aunt. Therefore, respondent’s notice of appeal does not comply with Rule 3.1(b).

This Court has held failure to serve a party’s notice of appeal on all other parties is a non-jurisdictional defect subject to waiver. *See Lee v. Winget Rd., LLC*,

204 N.C. App. 96, 100 (2010) (citing *Hale v. Afro-American Arts Int’l, Inc.*, 335 N.C. 231, 232 (1993)). Absent waiver, failure to serve the notice of appeal on all parties may subject the appeal to dismissal. *Id.* at 102. But our Supreme Court has cautioned this Court to carefully consider whether to dismiss a case for a “nonjurisdictional failure to comply with appellate rules[.]” *Id.* (citing *Dogwood*, 362 N.C. at 198). Dismissal, or any other sanctions under the appellate rules, should only be considered where there is a “substantial failure” to comply with, or “gross violation” of, the Rules of Appellate Procedure. *Id.*

There are two steps in this analysis. We must first determine whether Liam’s aunt waived service of the notice of appeal, and second, determine if dismissal of this appeal is an appropriate sanction for respondent’s failure to serve Liam’s aunt under Rule 3.1(b). As to waiver, our Supreme Court in *Hale* established a two part test: “a party upon whom service of notice of appeal is required may waive the failure of service [1] by not raising the issue by motion or otherwise *and* [2] by participating without objection in the appeal[.]” 335 N.C. at 232. Next, to determine if dismissal of an appeal is warranted:

this Court is required to make a fact-specific inquiry into the particular circumstances of each case mindful of the need to enforce the rules as uniformly as possible. Dismissal is appropriate only for the most egregious instances of nonjurisdictional default. To determine the severity of the rule violation, this Court is to consider: (1) *whether and to what extent the noncompliance impairs the court’s task of review*, (2) . . . *whether and to what extent review on the merits would frustrate the adversarial process*

... , and (3) the court may also consider the number of rules violated.

Lee, 204 N.C. App. at 102 (cleaned up).

Here, it is clear Liam’s aunt did not waive service of the notice of appeal. While Liam’s aunt did not raise the lack of service in a motion or otherwise, she also did not participate in this appeal without objection. Next, we must determine whether dismissal is appropriate by considering to what extent respondent’s failure to serve Liam’s aunt “impairs the court’s task of review”; to what extent “review on the merits would frustrate the adversarial process”; and the number of rules violated. *Id.* at 102.

Lee is an example of where dismissal of an appeal was warranted. In *Lee*, the underlying action involved numerous plaintiffs and defendants. *Id.* at 97. The defendants filed motions for summary judgment, which the trial court granted by a single order. *Id.* A subset of the plaintiffs filed a notice of appeal from the summary judgment order. *Id.* However, during the pendency of the plaintiff-appellants’ appeal a group of defendant-appellees filed a motion to dismiss the appeal because the plaintiff-appellants had failed to serve the notice of appeal on the non-appealing plaintiffs and a different, nonmovant group of defendant-appellees. *Id.* at 97.

After a review of *Hale* and *Dogwood*, this Court in *Lee* determined the plaintiff-appellants’ noncompliance with the Rules of Appellate Procedure impeded this Court’s review of the issues on appeal and frustrated the adversarial process,

requiring dismissal of the appeal.⁴ *Id.* at 102–04. This Court first noted that, based on the plaintiff-appellants’ failure to serve all parties and the information before the Court, it was impossible to determine whether the non-appealing plaintiffs were aware of the appeal:

Failure to serve notice of appeal on all parties is a significant and fundamental violation [of the appellate rules]. A notice of appeal is intended to let all parties to a case know that an appeal has been filed by at least one party. Because two of the parties to this case were never informed of the fact that there was an appeal which affects their interests, this Court has no way of knowing the positions these parties would have taken in this appeal. The fact that these parties have not objected to our consideration of the appeal is irrelevant, because as far as we can tell from the record, these parties are unaware of the appeal. Simply put, all parties to a case are entitled to notice that a party has appealed. The unserved plaintiffs have been denied the opportunity to be heard, as they received no notice of the appeal and there is no written waiver filed in the record or in response to the motion to dismiss.

Id. at 102–03.

The Court went on to explain that “[n]otice to all parties is not a mere formality but a fundamental requirement of” the appellate rules because “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise

⁴ The *Lee* Court’s analysis focused on the lack of service to the non-appealing plaintiffs because the unserved defendants were voluntarily dismissed with prejudice by all plaintiffs prior to the summary judgment order and notice of appeal. 204 N.C. App. at 103 n.3.

interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 103 (quoting *Mullane v. Cent. Hanover B. & T. Co.*, 339 U.S. 306, 314 (1950)). These “principles of due process” led the Court to conclude “that failure to serve the notice of appeal upon all parties [was] a gross violation of the rules which frustrates the adversarial process.” *Id.* at 103 (cleaned up).

The *Lee* Court emphasized that a party’s decision not to participate in an appeal must be a conscious choice: “Once notice is served upon all parties, any party may cho[o]se not to participate, but our [appellate] rules require that all parties have [*at least*] notice and an opportunity to participate to protect their own interests.” *Id.* at 103-04. Without participation by all parties, this Court “cannot review any contentions or arguments those parties might have raised.” *Id.* at 104.

The *Lee* Court ultimately concluded that notice to all parties was so fundamental a violation that no sanction less than dismissal could cure this defect.⁵ *Id.* at 104. Additionally, although our Supreme Court in *Dogwood* directed this Court to also consider Rule 2 before deciding to dismiss an appeal, the factual circumstances in *Lee* did not present the “exceptional circumstances where use of Rule 2 is required to prevent ‘manifest injustice’” to a party. *Id.* at 104; see N.C.R. App. P. 2 (“To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may . . . suspend or vary the requirements or provisions of

⁵ Rule of Appellate Procedure 34(b) prescribes the sanctions this Court may impose for failure to comply with the appellate rules. See N.C.R. App. P. 25(b).

any of these rules[.]”). The *Lee* Court did not expand on why Rule 2 should not be invoked other than to state the decision not to invoke Rule 2 was “reinforced by the fact that [the Court] ha[d] reviewed plaintiff-appellant’s substantive challenges to the trial court’s summary judgment order and conclude[d] that they ha[d] no merit.” *Id.*

In contrast, the factual circumstances in *MNC Holdings, LLC v. Town of Matthews* did not warrant dismissal of an appeal even though all parties were not served with notice of appeal. 223 N.C. App. 442, 445–47 (2012). In *MNC Holdings*, the Town of Matthews properly filed notice of appeal, but only emailed the notice of appeal to MNC Holdings’s attorney. *Id.* at 444. MNC waited until the deadline to serve the notice of appeal by mail passed then moved the trial court to dismiss the Town’s appeal for failure to properly serve the notice of appeal under the appellate rules. *Id.* at 444–45. The motion before the trial court was denied, and MNC Holdings renewed its motion in this Court. *Id.* MNC Holdings then participated in the appeal by filing a brief. *Id.* at 447.

While this Court acknowledged “the Town’s service violate[d] the appellate rules,” this Court disagreed with MNC Holdings’s assertion the Court did not have jurisdiction to hear the appeal. *Id.* at 445. After a brief review of *Hale*, *Dogwood*, and *Lee*, this Court held “any error in service made by the Town is non-jurisdictional and is not a substantial or gross violation of the appellate rules.” *Id.* at 447. Based upon a “fact-specific inquiry into the particular circumstances of [the] case[.]” *Lee*, 204 N.C. App. at 102, the Court determined “MNC ha[d] been given actual notice of

the Town’s appeal [by the Town’s email], allowing them to fully participate in the proceedings.” *MNC Holdings*, 223 N.C. App. at 447. “[B]oth parties to th[e] appeal [were] present and ha[d] submitted well researched briefs. Any technical error in service alleged by MNC ha[d] not materially impeded the adversarial process or impaired [the Court’s] ability to examine the merits of th[e] appeal.” *Id.* This Court ultimately concluded “[w]hile practitioners need be cautioned that non-compliance with the Rules in future cases may result in dismissal and that an appellate discussion of their failure to follow the rules should be unnecessary, dismissal of the Town’s appeal [was] unwarranted under the facts of th[e] case.” *Id.*

The facts of the present case are more similar to those in *Lee* than *MNC Holdings*. In all three cases, both requirements for waiver of service of the notice of appeal were not met. Here, Liam’s aunt did not raise the issue by motion or otherwise – satisfying the first requirement – but did not participate without objection in this appeal, leaving the second requirement unsatisfied. *See Hale*, 335 N.C. at 232. Unlike in *MNC Holdings*, Liam’s aunt has not participated in this appeal by filing a brief, motion, or other document.

Additionally, respondent’s failure to serve Liam’s aunt “impairs the court’s task of review[.]” and “frustrate[s] the adversarial process[.]” *Lee*, 204 N.C. App. at 102. First, the adversarial process is frustrated because this Court cannot determine whether Liam’s aunt’s absence in this appeal is a conscious choice, or to what extent she is aware of the appeal. “A notice of appeal is intended to let all parties to a case

know that an appeal has been filed by at least one party.” *Id.* at 102–03. Although subsequent documents were served on Liam’s aunt, it is not clear on the record before us that Liam’s aunt has knowledge of this appeal.⁶ *Lee* seems to indicate a “written waiver filed in the record or in response to [a] motion to dismiss” may substitute for notice of appeal and establish actual knowledge by an unserved appellee, but does not appear to endorse substituting service of other appellate filings for the notice of appeal. *Id.* at 103.

Second, respondent’s “noncompliance [also] impairs this Court’s task of review” because Liam’s aunt has “been omitted from the case and we cannot review any contentions or arguments [she] might have raised.” *Lee*, 204 N.C. App. at 104. Although we acknowledge it is possible the GAL and DSS raised “contentions or arguments” similar to that which an appointed guardian might make or agree with, there is still no indication of any tacit acknowledgment by Liam’s aunt that she would have agreed with the arguments the appellees did make in their briefs. We have no way of knowing if Liam’s aunt would have raised different issues or made different arguments from what the appellees briefed. There is also no indication in the record or briefs that the GAL or DSS discussed this appeal and their arguments with Liam’s

⁶ The records and briefs were apparently served on Liam’s aunt in the care of her sister, and at her sister’s address in South Carolina. Without extensively discussing the underlying facts of this case, we note Liam’s aunt was planning to move to South Carolina where she would briefly reside with her sister. However, the record does not clarify whether Liam’s aunt actually moved to South Carolina, or whether she moved into her sister’s home.

aunt.

Additionally, we are apprehensive toward allowing service of other documents to substitute for service of the notice of appeal. As noted in *Dogwood*, “[t]he final principal category of default involves a party’s failure to comply with one or more of the nonjurisdictional requisites prescribed by the appellate rules. This comprehensive set of nonjurisdictional requirements is designed primarily to keep the appellate process ‘flowing in an orderly manner.’” 362 N.C. at 198. To that end, both the jurisdictional and nonjurisdictional rules should “be enforced as uniformly as possible.” *Id.* at 200. As established in *Lee*, “requiring service of the notice of appeal on all parties promotes uniformity in enforcement of the rules . . . and as noted above, [service of the notice of appeal] is a fundamental requirement for the rest of the appeal.” 204 N.C. App. at 104.

Service of the notice of appeal is necessary for the orderly and effective resolution of appeals before this Court. “A notice of appeal is intended to let all parties to a case know that an appeal has been filed by at least one party.” *Id.* at 102–03. Allowing service of subsequent documents to substitute for service of the notice of appeal poses a risk of gamesmanship before this Court that would undermine the goal of the appellate rules in “keeping the appellate process ‘flowing in an orderly manner.’” *Dogwood*, 362 N.C. at 198. For example, although service of a proposed record on appeal might give a party who was not served the notice of appeal actual knowledge of the appeal, the unserved party would simultaneously

receive knowledge of the appeal but also notice that their response to the proposed record on appeal is due in a mere ten days.⁷ *See* N.C.R. App. P. 3.1(d). While the unserved appellee could move for additional time in which to file their response, *see* N.C.R. App. P. 27(c), allowing review following noncompliance with the rules governing service of the notice of appeal would not “promote[] uniformity in [the] enforcement of the rules[.]” *Lee*, 204 N.C. App. at 103–04, or “promote the ends of justice” as is the goal of rules of practice and procedure. *Dogwood*, 362 N.C. at 194.

Additionally, this case does not present the kind of “rare occasion[]” and “exceptional circumstances” that require this Court to invoke Rule 2 and review the merits of respondent’s appeal in order “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]” *Id.* at 201 (citations and quotation marks omitted); *see Lee*, 204 N.C. App. at 104. Here, respondent made a relatively simple error, that happens to have severe consequences. Further, respondent’s arguments do not persuade us to apply Rule 2. Respondent generally makes two categories of argument, addressing (1) the trial court’s decision to award guardianship to Liam’s aunt and (2) the trial court’s framework for visitation between Liam and respondent. Similar to the case in *Lee*, our decision to dismiss is bolstered by the fact that respondent’s arguments addressing guardianship are meritless. As to respondent’s

⁷ There is also a distinct possibility that a guardian, if an unrepresented layperson, may not understand the significance of the proposed record and numerous documents contained therein. A notice of appeal, on the other hand, includes the minimum information required to “let all parties to a case know that an appeal has been filed[.]” *Lee*, 204 N.C. App. at 102.

arguments addressing visitation, respondent is free to file a motion in the cause at any time to seek modification of visitation. *See* N.C.G.S. § 7B-905.1(d) (2021); N.C.G.S. § 7B-1000(a) (2021). We decline to invoke Rule 2 to suspend the service provision of Rule 3.1(b). We also note “[n]o lesser sanction, such as monetary sanctions, can remedy this particular rule violation, as a sanction less than dismissal cannot make up for the failure to notify all parties of the existence of this appeal.” *Lee*, 204 N.C. App. at 104.

Rule 3.1(b) is clear that respondent’s notice of appeal must be served “on all other parties” to the appeal. N.C.R. App. P. 3.1(b). Upon entry of the Permanency Planning Order determining guardianship was the permanent plan for Liam and appointing Liam’s aunt his guardian, Liam’s aunt automatically became a party to the permanency planning proceeding. Respondent did not serve Liam’s aunt, and respondent’s notice of appeal was therefore noncompliant with Rule 3.1(b). Respondent’s failure to serve Liam’s guardian was subject to waiver, but there is no indication in the record Liam’s guardian has waived service of the notice of appeal. Absent waiver, respondent’s appeal was subject to dismissal if failure to serve the notice of appeal frustrated the adversarial process and impaired this Court’s task of review. Because, for the reasons stated in *Lee*, respondent’s failure to serve Liam’s aunt both frustrated the adversarial process and impaired this Court’s task of review, respondent’s appeal should be dismissed.

III. Conclusion

IN RE: L.M.

Opinion of the Court

Liam's aunt did not waive service of the notice of appeal, and respondent's failure to serve the notice of appeal on Liam's aunt warrants dismissal of this appeal. Respondent's appeal is dismissed.

DISMISSED.

Chief Judge STROUD and Judge STADING concur.

Report per Rule 30(e).