

No. 1-13-3025

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--|---|--------------------|
| MILIJANA VLASTELICA, Individually and as |) | Appeal from the |
| Next Friend of KRISTIAN N. CHEHAIBER, |) | Circuit Court of |
| |) | Cook County. |
| Plaintiff-Appellants, |) | |
| |) | No. 10 L 001908 |
| v. |) | |
| |) | |
| JEFFFREY W. BREND and LEVIN AND BREND, P.C., |) | Honorable |
| |) | Kathy M. Flanagan, |
| Defendants-Appellees. |) | Judge Presiding. |

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justice Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiffs appealed from the order striking their section 2-1401 petition from the motion call. We dismissed the appeal for lack of jurisdiction because the strike order was not a final judgment.

¶ 2 Plaintiffs, Milijana Vlastelica (Milijana), individually and as next friend of her minor son, Kristian N. Chehaiber (Kristian), appeal the order striking their section 2-1401 petition (735 ILCS 5/2-1401 (West 2012)) from the motion call. We dismiss for lack of appellate jurisdiction.

¶ 3 Plaintiffs filed a three-count complaint against the child representative appointed in the underlying divorce action, Jeffrey W. Brend (Brend), and Brend's private law firm Levin and Brend, P.C. (collectively referred to as defendants). The complaint alleged: (1) legal malpractice; (2) intentional breach of fiduciary duty; and (3) intentional interference with

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Milijana's custody rights. On July 2, 2010, the circuit court granted defendants' motion to dismiss with prejudice pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)), finding that defendants were absolutely immune from civil liability for Brend's work performed as child representative. Plaintiffs filed a motion to reconsider, which the circuit court denied on August 16, 2010. Plaintiffs appealed. On August 8, 2011, the appellate court filed an opinion affirming the dismissal order, holding that Brend was entitled to absolute immunity for his work performed as child representative. See *Vlastelica v. Brend*, 2011 IL App (1st) 102587.

¶ 4 On August 8, 2013, plaintiffs filed their *pro se* section 2-1401 petition, arguing that the circuit court was wrong in finding that Brend was entitled to absolute immunity and in dismissing the case with prejudice, and that the appellate court also was wrong in affirming the circuit court's dismissal order. Plaintiffs asked the circuit court to vacate the appellate court opinion affirming the dismissal order and to reinstate the case. Defendants filed a pleading opposing plaintiffs' section 2-1401 petition, arguing that the petition was "frivolous" and "nothing more than a rehash of the same arguments rejected multiple times by multiple courts." Defendants requested therein that the circuit court deny the section 2-1401 petition.

¶ 5 On August 23, 2013, the circuit court entered a pre-printed order entitled "case management order," with an "x" marked next to the words, "case stricken from motion call." The order further stated, in handwriting: "Plaintiffs' 2-1401 petition is stricken because the court lacks jurisdiction." No hearing was held prior to the entry of the order. Plaintiffs filed their *pro se* notice of appeal on September 20, 2013.

¶ 6 Initially, we address our jurisdiction over plaintiffs' appeal. See *Department of Healthcare & Family Services v. Cortez*, 2012 IL App 2d 120502, ¶ 7 (noting that a reviewing

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court has a duty to consider *sua sponte* whether it has jurisdiction and must dismiss an appeal if jurisdiction is lacking). "Pursuant to Illinois Supreme Court Rule 303(a)(1) (eff. June 4, 2008), a notice of appeal must be filed within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against judgment is filed, within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order." *Won v. Grant Park 2, L.L.C.*, 2013 IL App (1st) 122523, ¶ 20. "A final judgment is a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit. A judgment is final if it determines the litigation on the merits so that, if affirmed, nothing remains for the trial court to do but to proceed with its execution." *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 232-33 (2005).

¶ 7 In *OneWest Bank, FSB v. Topor*, 2013 IL App (1st) 120010, we held that where the circuit court struck a section 2-1401 petition and ordered the filing of a second petition, there was no final, appealable judgment. In so holding, we cited a line of cases including *Belluomini v. Lancome*, 207 Ill. App. 3d 583 (1990). In *Belluomini*, we held that where the circuit court entered an order stating in pertinent part that the "plaintiff's motion to vacate is stricken," the order did not constitute a ruling on the merits and the struck motion remained pending. *Id.* at 585-86. Our holding was premised on: (1) the circuit court's use of the word "stricken" rather than the terms "denied" or "dismissed"; and (2) the circuit court's failure to use the words "with prejudice" when striking the plaintiff's motion. *Id.*

¶ 8 In the present case, defendants asked the circuit court to deny plaintiffs' section 2-1401 petition. A denial of the section 2-1401 petition as requested by defendants would have ended the litigation and constituted a final, appealable judgment. However, the circuit court entered a

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pre-printed "case management order" on August 23, 2013, striking the section 2-1401 petition from the "motion call." The handwritten portion of the order stated in its entirety: "Plaintiffs' 2-1401 petition is stricken because the court lacks jurisdiction." No hearing was held and no further explanation was given by the circuit court regarding its reasoning for striking the petition from the motion call as opposed to dismissing or denying it. The order did not state it was being made "with prejudice." On these facts and this record, and in accordance with *Topor* and *Belluomini*, we hold that the August 23, 2013, order striking plaintiffs' section 2-1401 petition from the motion call (without stating it was "with prejudice") was not a final judgment. In the absence of a final judgment, we lack jurisdiction over plaintiff's appeal. Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008). Accordingly, plaintiffs' appeal is dismissed.

¶ 9 For the foregoing reasons, we dismiss plaintiffs' appeal.

¶ 10 Dismissed.