[Cite as *Stepp v. Starrett*, 2019-Ohio-4707.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
VINTON COUNTY

Shawn E. Stepp, II,	:	Case No. 18CA714
Plaintiff-Appellant,	:	
v.	:	DECISION AND JUDGMENT ENTRY
Michele Starrett, et al.,	:	
Defendants-Appellees.	:	**RELEASED 10/28/2019**

APPEARANCES:

Sky Pettey, Lavelle and Associates, Athens, Ohio for Appellant.

Stephen C. Rodeheffer, Portsmouth, Ohio for Appellees.

Hess, J.

{¶1} Shawn E. Stepp, II appeals the trial court's order dismissing his claims against Michele Starrett, individually and in her capacity as the trustee for the Lawrence G. Daft Revocable Living Trust Agreement; the Lawrence G. Daft Revocable Living Trust Agreement; and Daft Farms Family Limited Partnership. Steep sought an accounting and alleged breaches of the limited partnership agreement and breaches of the fiduciary duties of loyalty and care. The trial court granted the defendants' motion for summary judgment on the ground that Stepp lacked standing, dismissed Stepp's amended complaint, and assessed costs against Stepp. However, the action involved multiple claims and parties. The counterclaim of Daft Farms Family Limited Partnership against Stepp remains pending. The judgment entry originally appealed fails to include a

determination that there is no just reason for delay as require by Civ.R. 54(B). Therefore, the judgment entry is not a final appealable order and we lack jurisdiction.

{¶2} We ordered Stepp to file a memorandum addressing the jurisdictional issue. In response, the parties obtained a nunc pro tunc entry from the trial court that contained Civ.R. 54(B) language, acknowledged that the original entry did not contain Civ.R. 54(B) language, and asked that the appeal proceed rather than be dismissed. Civ.R. 60(A) allows a trial court to correct clerical mistakes in judgments, orders or other parts of the record with leave from the appellate court. However, because the original judgment entry appealed lack Civ.R. 54(B) language, it is not a final appealable order. As a result, this court lacks jurisdiction to rule on any aspect of the controversy, including a request for leave to file a 60(A) motion in the trial court. Thus 60(A) cannot be used to add Civ.R. 54(B) language to the order during the pendency of an appeal. For these reasons we lack jurisdiction and dismiss the appeal.

LEGAL ANALYSIS

{¶3} Before we reach the merits of the appeal, we must determine if we have jurisdiction. Appellate courts "have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district[.]" Section 3(B)(2), Article IV, Ohio Constitution; *see also* R.C. 2505.03(A). If a court's order is not final and appealable, we have no jurisdiction to review the matter and must dismiss the appeal. *Eddie v. Saunders*, Gallia App. No. 07CA7, 2008–Ohio–4755, at ¶ 11. If the parties do not raise the jurisdictional issue, we must raise it sua sponte*. Ray v. Wal-Mart Stores, Inc.,* 4th Dist. Washington No. 10CA27,

2011-Ohio-5142, ¶ 8 citing *Sexton v. Conley*, Scioto App. No. 99CA2655, 2000 WL 1137463, *2 (Aug. 7, 2000).

{¶4} Under R.C. 2505.02, an order is final when it is: an order that affects a substantial right in an action that in effect determines the action and prevents a judgment; an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment; an order that vacates or sets aside a judgment or grants a new trial; or an order that grants or denies a provisional remedy. R.C. 2505.02(B)(1)-(4). "A final order determines the whole case, or a distinct branch thereof, and reserves nothing for future determination, so that it will not be necessary to bring the cause before the court for further proceedings." *Savage v. Cody–Ziegler, Inc*., Athens No. 06CA5, 2006–Ohio–2760, at ¶ 8.

{¶5} When a court issues a judgment that disposes of some claims but leaves other claims pending, the order is final and appealable only if the judgment complies with Civ.R. 54(B), which states:

> (B) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

{¶6} Civ.R. 54(B) allows a trial court to enter final judgment as to one or more but fewer than all claims in a multi-claim action only upon an express determination of "no

just reason for delay." Without this language, a reviewing court does not have jurisdiction and must dismiss the appeal. *See Noble v. Colwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989). "Unless those words appear, the order cannot be either final or appealable even if the trial court declares it to be." *Savage v. Cody-Ziegler, Inc*., 4th Dist. Athens No. 06CA5, 2006-Ohio-2760, ¶ 9 citing *Noble* at 96; *Ft. Frye Teachers Assn. v. Ft. Frye Local School Dist. Bd. of Edn*., 87 Ohio App.3d 840, 843, 623 N.E.2d 232, fn. 4 (4th Dist.1993).

{¶7} In this case, the trial court's decision granting defendants' summary judgment on Stepp's claims did not address Daft Farms' counterclaim. And the judgment entry, though declaring itself to be a final appealable order, did not contain Civ.R. 54(B) language. On August 2, 2019, we issued an order stating that the order may not be a final appealable order because a counterclaim remained pending and the entry does not contain Civ.R. 54(B) language. We ordered Stepp to file a memorandum addressing the jurisdictional issue and we cancelled the pending oral argument set for later that month.

{¶8} In response, Stepp and Starrett filed a joint response in which they agreed that the court's entry did not contain Civ.R. 54(B) language. The parties attached a copy of an August 9, 2019 nunc pro tunc entry as an exhibit to their joint response. The August 9, 2019 nunc pro tunc entry states that the prior order lacked a Civ.R. 54(B) determination though the trial court and the parties intended that the order be immediately appealable.

{¶9} However, if the trial court intended to make a factual determination that an interlocutory appeal would lead to judicial economy and would be the most effective use of the parties' resources, but failed through oversight to make such a determination, it cannot use a "nunc pro tunc" order to correct the December 3, 2018 order. "A nunc pro tunc order cannot be used to supply omitted action, or to indicate what the court might or

should have decided, or what the trial court intended to decide. Its proper use is limited to what the trial court actually did decide." Nunc pro tunc entries "are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided or what the court intended to decide." *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028 citing *State ex rel. Fogle v. Steiner,* 74 Ohio St.3d 158, 164, 656 N.E.2d 1288 (1995); *State v. Evans*, 161 Ohio App.3d 24, 2005-Ohio-2337, 829 N.E.2d 336, ¶ 9 (4th Dist.).

{¶10} We question the use of a "nunc pro tunc" entry to add Civ.R. 54(B) language as it may jeopardize a party's ability to file a timely appeal. Where a party does not appeal an interlocutory order and the trial court later issues a nunc pro tunc entry adding "no just reason for delay" more than 30 days after the interlocutory order was issued, a party can no longer file a timely appeal. A proper nunc pro tunc entry does not give rise to a new final order for purposes of appeal and by its very nature applies retrospectively to the judgment it corrects. *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, syllabus. A nunc pro tunc entry does not restart the clock or extend the time within which to file an appeal. *See Matter of H.S.*, 2017-Ohio-457, 84 N.E.3d 127, ¶ 49 (4th Dist.) citing *State ex rel. Womack v. Marsh*,128 Ohio St.3d 303, 2011-Ohio-229, 943 N.E.2d 1010, ¶ 15. And, a nunc pro tunc entry should not be used to remove Civ.R. 54(B) language from an order. *See U.S. Bank v. Schubert,* 9th Dist. Lorain No.13CA010462, 2014-Ohio-3868, ¶ 9-12.

{¶11} We must dismiss an appeal for lack of jurisdiction when the order lacks Civ.R. 54(B) language. *See Gemmell v. Anthony*, 2019-Ohio-469, __N.E.3d__ (4th Dist.) (Abele, J.) ("Although we recognize that the absence of this phrase may seem

trivial, we nevertheless are obligated to follow well-established case authority."). When there is no final appealable order, the appellate court "has no jurisdiction to rule on any aspect of the controversy, including [appellant's] request for leave to file a Civ.R. 60(A) motion in the trial court to correct a mistake in the trial court's judgment entry." *Worch v. Worch*, 2d Dist. Darke No. 98CA1477, 1999 WL 375595, * 4 (June 11, 1999). Because the original judgment entry lacked Civ.R. 54(B) language, it was not a final appealable order. And, because an appeal was pending, the trial court lacked jurisdiction to issue the August 9 nunc pro tunc entry and that entry is void. *Howard v. Catholic Social Serv. Of Cuyahoga Cty., Inc.*, 70 Ohio St.3d 141, 1994-Ohio-219, 637 N.E.2d 890; *Steinle v. Steinle*, 2018-Ohio-3985, 120 N.E.3d 478, ¶ 55 (6th Dist.).

{¶12} Because this appeal is dismissed, the December 3, 2018 interlocutory order will be subject to substantive revision at any time before the entry of judgment adjudicating all the claims of all parties. Civ.R. 54(B). This is consistent with the general rule that a trial court has plenary power to review its own interlocutory orders prior to entering final judgment. *Mindlin v. Zell*, 10th Dist. Franklin No. 11AP-983, 2012-Ohio-3543, ¶ 21.

{¶13} Upon the dismissal of this appeal, the trial court may enter an amended judgment entry that includes the proper Civ.R. 54(B) "no just reason for delay" language. Either party may file an appeal from the amended judgment entry. After the second appeal is filed, the parties should file a motion to supplement the new appeal with the orders and briefs filed in this case, Vinton App. No. 18CA714. Neither party is required to re-brief the legal issues.

CONCLUSION

{¶14} The judgment is not a final appealable order and this court is without jurisdiction to consider the matter on its merits. The appeal is dismissed and the August 9, 2019 nunc pro tunc entry is void.

{¶15} The clerk shall serve a copy of this order on all counsel of record at their last known addresses by ordinary mail.

APPEAL DISMISSED. COSTS TO APPELLANT. IT IS SO ORDERED.

Smith, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, Judge