[Cite as *Fertec, L.L.C. v. BBC&M Engineering, Inc.*, 2009-Ohio-5121.]

[See nunc pro tunc opinion at 2009-Ohio-5246.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Fertec, LLC,	:	
Plaintiff-Appellant,	:	No. 08AP-998 (C.P.C. No. 07CVH10-13150)
v.	:	(REGULAR CALENDAR)
BBC&M Engineering, Inc. et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 29, 2009

Lane, Alton & Horst, *Mary Barley-McBride* and *Scott A. Fenton*, for appellant.

Faulkner & Tepe, LLP, *John C. Scott* and *Jason H. Meyer*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, Fertec, LLC ("appellant"), appeals from the October 28, 2008 judgment entry granting partial summary judgment in favor of defendant-appellee BBC&M Engineering, Inc. ("appellee"). Because the judgment from which appellant appeals is not a final, appealable order, we must dismiss this appeal.

{¶2} In preparation to construct a single family residence, appellant contracted with appellee for certain subsurface, geotechnical engineering services.[1] Around two months after appellee performed its services, the foundation of the residence began to experience excessive settlement, which resulted in the cracking of the basement walls. As a result, appellant filed the instant action, which presents claims for breach of contract and negligence. Appellant has allegedly incurred nearly $530,000 in damages as a result of appellee's services.

{¶3} Appellee filed a motion for partial summary judgment on the sole issue of whether the limitation of liability provision in the parties' agreement was enforceable. Appellant opposed the motion and argued that the provision either did not apply or was unenforceable. In a decision rendered October 9, 2008, the trial court granted appellee's motion and held that the contract contained an enforceable limitation of liability provision that applied to the circumstances of this case, and in accordance with the provision, any potential recovery on the part of appellant was limited to the amount of the agreement, which equaled $6,427.80. Notably, neither the breach of contract claim nor the negligence claim was resolved by the judgment.

{¶4} On October 28, 2008, the trial court signed a judgment entry that contained Civ.R. 54(B) language indicating that it was a final, appealable order, and there was "no just reason for delay." (Oct. 28, 2008 judgment entry.) It is from this judgment that appellant appeals and raises three merit-based assignments of error.

{¶5} Before we review the substantive merit of the judgment, we must first determine whether we have jurisdiction over this matter. An appellate court has

[1] For ease and clarity, this court will hereinafter refer to the two separate agreements as one.

jurisdiction to review the final orders or judgments of the trial courts within its district. See Section 3(B)(2), Article IV, Ohio Constitution; see also R.C. 2505.02. Where, as here, the parties fail to raise the issue of whether a judgment constitutes a final, appealable order, the appellate court must raise the jurisdictional issue sua sponte.[2] *Whitaker-Merrell v. Geupel Const. Co.* (1972), 29 Ohio St.2d 184, 186, citing *Cincinnati v. Butler* (1966), 5 Ohio St.2d 80.

{¶6} Consequently, the threshold issue regards whether the granting of a partial summary judgment on the enforceability of a contractual provision that limits a party's potential recovery constitutes a final, appealable order when all claims remain unresolved by the judgment. For the reasons that follow, we find that it does not.

{¶7} "It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20. To determine whether a judgment is final, an appellate court must employ a two-step analysis:

> First, it must determine if the order is final within the requirements of R.C. 2505.02. If the court finds that the order complies with R.C. 2505.02 and is in fact final, then the court must take a second step to decide if Civ.R. 54(B) language is required.

Id. at 21; see also *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221, ¶13; see also *Wisintainer v. Elcen Power Strut Co*. (1993), 67 Ohio St.3d 352, 355.

{¶8} Regarding the first step of the analysis and primarily because both parties failed to brief the issue, it is unclear which portion of R.C. 2505.02 forms the basis of the argument that the judgment was a final order. During oral argument, counsel relied

[2] Prior to oral argument, the court informed counsel of its intent to pose questions on the issue.

exclusively upon the requirements under R.C. 2505.02(B)(1), which generally requires that the order must affect a substantial right that "in effect determines the action and prevents a judgment." However, it might also be argued that R.C. 2505.02(B)(4) provides the basis for counsels' position. That section provides:

> An order that grants or denies a provisional remedy and to which both of the following apply:
>
> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

Furthermore, R.C. 2505.02(A)(3) defines a "provisional remedy" as:

> [A] proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

{¶9} We will not conclusively determine whether the trial court's judgment was a provisional remedy under R.C. 2505.02(B)(4) because no arguments have been set forth regarding the issue. We will, however, note how other cases have been resolved. See *MD Acquisition, L.L.C. v. Myers*, 173 Ohio App.3d 247, 2007-Ohio-3521 (partial summary judgment on advancement of legal expenses neither satisfies R.C. 2505.02(B)(1) nor 2505.02(B)(4)); *Bautista v. Kolis*, 142 Ohio App.3d 169, 2001-Ohio-3159 (partial summary judgment granted on choice-of-law and insurance coverage issues neither satisfies R.C. 2505.02(B)(1) nor 2505.02(B)(4)); *Stalnaker v. Sisson*, 9th Dist. No. 24008, 2008-Ohio-

4561 (partial summary judgment on insurance coverage issues neither satisfies R.C. 2505.02(B)(1) nor 2505.02(B)(4)); *Miklovic v. Dean*, 5th Dist. No. 04-CA-27, 2005-Ohio-3252, ¶27 ("[a]n order granting partial summary judgment in favor of a party does not meet the criteria identified in R.C. 2505.02(B)").

{¶10} Nevertheless, without conclusively determining whether the judgment constitutes a provisional remedy, we find that the judgment fails to meet R.C. 2505.02(B)(4)(b). Specifically, counsel have not shown that appellant would lack a meaningful remedy by appealing after a final judgment. Indeed, carefully constructed jury interrogatories will preserve the issue for appellate review after a final judgment.

{¶11} Next, we must consider whether the judgment in effect determines the action and prevents judgment. R.C. 2505.02(B)(1). It is well-settled that orders determining liability and deferring the issue of damages are not final, appealable orders, because they do not determine the action or prevent a judgment. *State ex rel. White v. Cuyahoga Metro. Hous. Auth.* (1997), 79 Ohio St.3d 543, 546, citing *State ex rel. A&D Ltd. Partnership v. Keefe* (1996), 77 Ohio St.3d 50, 53; see also *Fireman's Fund Ins. Cos. v. BPS Co.* (1982), 4 Ohio App.3d 3; *Summit Petroleum, Inc. v. K.S.T. Oil & Gas Co.* (1990), 69 Ohio App.3d 468; *Mayfred Co. v. City of Bedford Hts.* (1980), 70 Ohio App.2d 1; *Cammack v. V.N. Holderman & Sons, Inc*. (1973), 37 Ohio App.2d 79; *American Mall, Inc. v. City of Lima* (1966), 8 Ohio App.2d 181. Additionally, at least one appellate court has held the inverse to be true. See *Clark v. Grillot*, 2nd Dist. No. C.A. 1538, 2001-Ohio-1691. Specifically, *Clark* held that "a final order would not exist where damages have been decided but liability is unresolved. Consequently, the order in the present case would not be final for purposes of appeal if either liability or damages was not resolved."

{¶12} These holdings are consistent with the reasoning that provides " '[f]or an order to determine the action and prevent a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court.' " *Raphael v. Brigham* (Nov. 9, 2000), 10th Dist. No. 00AP-328, quoting *Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St.3d 147, 153.

{¶13} In the instant matter, neither the issue of liability nor the issue of damages was resolved by the trial court's judgment. Both parties must concede that appellant is fully capable of obtaining a judgment on either or both of the two claims appellant presented. The trial court's judgment simply limits the amount of appellant's potential recovery to $6,427.80. Our analysis under R.C. 2505.02(B)(1) should end here. However, both parties nevertheless argue that the limitation affects a substantial right and practically prevents a judgment because it will cost more than $6,427.80 to fully litigate the issues.

{¶14} The results of accepting counsels' position would inevitably cause appellate courts to become the arbiters of any and all otherwise nonfinal orders. Any competent counsel could make an argument that a client's position was jeopardized in such a way as to practically prevent a judgment. For example, otherwise nonfinal discovery orders pertaining in some way to the issue of damages would potentially be subject to appellate review. By affording appeal rights in such circumstances, a trial court's proceedings will constantly be interrupted. Although judicial economy forms the basis of counsels' position, the inevitable aftermath undermines counsels' argument.

{¶15} Furthermore, jurisdiction may not simply be bestowed upon an appellate court by the parties or the trial court where it is convenient or cost-efficient. See *Bush v. Beggrow*, 10th Dist. No. 03AP-1238, 2005-Ohio-2426, ¶7, citing *White* at 544. Therefore, while we acknowledge the fact that the case may not be worth litigating if this court ultimately upholds the trial court's judgment regarding the enforceability of the contractual provision, our jurisdictional authority is unwavering. The judgment in this matter clearly does not meet the requirements of either R.C. 2505.02(B)(4) or 2505.02(B)(1). To hold to the contrary would require this court to abolish well-settled law, while simultaneously creating new law.

{¶16} Nevertheless, counsel argue that a trial judge may make a factual determination regarding whether judicial economy supports a finding in favor of a final, appealable order. In support of this position, counsel rely exclusively on *Wisintainer*. However, the actual holding in *Wisintainer* is not nearly as broad as counsel suggests. In conducting its analysis, the *Wisintainer* court first held that the judgment was final in accordance with R.C. 2505.02. Id. at 355. This finding distinguishes *Wisintainer* from the instant appeal. Indeed, the *Wisintainer* trial court made the factual determination to convert an already final order into a final, appealable order by including Civ.R. 54(B) certification. Id. at 354. Specifically, *Wisintainer* held:

> [T]he phrase "no just reason for delay" is not a mystical incantation which transforms a nonfinal order into a final appealable order. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 541 N.E.2d 64. Such language can, however, through Civ.R. 54(B), transform a final order into a final appealable order.

Id. This analysis is consistent with the well-settled principle that " 'Civ.R. 54(B) does not alter the requirement that an order must be final before it is appealable.' " *Gen. Acc. Ins*. at 21, quoting *Douhitt v. Garrison* (1981), 3 Ohio App.3d 254, 255.

{¶17} If we accept counsels' position and rely solely upon *Wisintainer* in the disposition of this matter, we will be forced to disregard the first step of the two-step analysis. Indeed, counsels' position presupposes the existence of a final order. Therefore, counsels' reliance upon *Wisintainer* in the instant matter is misplaced. We may not make the leap that counsel suggests and disregard the first step of the analysis. *Wisintainer* is easily distinguishable from the instant matter because we do not reach the issue of Civ.R. 54(B) certification.

{¶18} The facts of this matter are most analogous to the facts of *Adams Lapidary & Gem Shop, Inc. v. Sonitrol of Youngstown, Inc*. (Apr. 4, 1991), 7th Dist. No. 90 C.A. 34.[3] The plaintiff in that case was a retail company that contracted for the purchase and installation of a security alarm system. After a break-in, the retail store filed a negligence suit against the security provider and sought damages of $200,000. Id. The security provider sought summary judgment on the narrow issue of:

> [W]hether or not the exculpatory language on the back of the contracts limiting liability for the defendants in the amount of six (6) monthly payments or $250.00, whichever is lesser, is a valid limit of liquidated damages or a penalty.

Id. The trial court concluded that the provision was an enforceable liquidated damages provision. Additionally, the trial court included Civ.R. 54(B) language in the judgment entry. Upon appeal, the Seventh Appellate District held:

[3] Lexis captions this case as "*Adams*," while Westlaw captions it as "*Adamas*."

> It is obvious from a review of the transcript that all of the claims posed by the plaintiff-appellant in its complaint are still pending in the trial court. There has been no disposition of its claim as to Sonitrol Corp. and there has been no final disposition of its claim as to Sonitrol of Youngstown, Inc. There has only been a limitation of the amount which the appellant might recover if it succeeds in its claim.

Id. As a result, the Seventh District noted that appellant could still obtain a final judgment on its claim, just not in an amount that it desired. Therefore, the Seventh District dismissed the appeal and remanded the matter back to the trial court. Id.

{¶19} This court has reached the same conclusion on a similar issue in the past. See *R&H Trucking, Inc. v. Occidental Fire & Cas. Co. of North Carolina* (1981), 2 Ohio App.3d 269. In *R&H Trucking*, this court held:

> Where only one claim for relief has been presented, and the trial court decides one of the legal issues involved in the case, but does not finally adjudicate the claim for relief, the court's decision does not become a final judgment subject to appeal simply by reason of the inclusion of Civ. R. 54(B), "no just reason for delay" language, in the court's order. See *CMAX, Inc. v. Drewry Photocolor Corp*. (C.A. 9, 1961), 295 F. 2d 695. Here, the judgment entry * * * does not purport to adjudicate plaintiff's claim for relief. Instead, the order limits the kinds of damages which might be awarded to plaintiff if it is successful in establishing its claim for relief at trial.

Id. at 271. After conducting this analysis, this court dismissed the appeal. Id. at 272.

{¶20} As in *Adams Lapidary & Gem Shop*, the judgment in this matter determined that the contract contained an enforceable provision that limited appellant's potential recovery to $6,427.80. The judgment left unresolved the liability and the damages portions of appellant's only two claims. Therefore, despite the judgment, appellant may still recover on either or both of its claims. The trial court's judgment merely limits the total amount appellant may recover if it ultimately prevails. As a result, we find that there is no

final, appealable order under R.C. 2505.02(B)(1). This is not to suggest that appellant loses its appeal rights regarding the trial court's determination. Indeed, as set forth above, if necessary, this court may review the merits of the trial court's decision after a final judgment. Therefore, we find that there is no final, appealable order under R.C. 2505.02(B)(4). Because the trial court's judgment does meet the requirements of R.C. 2505.02, we do not reach the Civ.R. 54(B) certification analysis set forth in *Wisintainer*. As a result, *Wisintainer* is distinguishable from the instant matter.

{¶21} Based upon the foregoing analysis, we find that the order from which appellant appeals is not a final, appealable order under R.C. 2505.02. Having reached this determination, we conclude that this court lacks jurisdiction over this matter. We must therefore dismiss appellant's appeal.

Appeal dismissed.

TYACK and KLATT, JJ., concur.