[Cite as *Daniels-Rodgers v. Rodgers*, 2015-Ohio-1974.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Stacie Daniels-Rodgers,	:	
Plaintiff-Appellant,	:	
		No. 15AP-202
v.	:	(C.P.C. No. 13DR-3591)
Demondre L. Rodgers,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on May 21, 2015

Suzanne K. Sabol, for appellant.

Arnold S. White, for appellee.

ON MOTION TO DISMISS

KLATT, J.

{¶ 1} This is an appeal filed by plaintiff-appellant, Stacie Daniels-Rodgers, from a judgment and decree of divorce entered by the Franklin County Court of Common Pleas, Division of Domestic Relations. The matter is presently before us on a motion to dismiss filed by defendant-appellee, Demondre L. Rodgers, who contends that appellant filed her notice of appeal out of rule and that as a result this court lacks jurisdiction to consider the appeal.

{¶ 2} Proceedings in the trial court culminated in a trial before a judge on January 13 and 14, 2015. The trial court entered a judgment entry and decree of divorce on February 11, 2015, resolving all issues in the case. On February 17, 2015, the trial court entered a corrected decision identical in all respects to the February 11, 2015 entry and decree, except that it substituted the word "holidays" in place of "holiday weekends" on

page nine of the decision. The court accompanied this corrected decision with the following entry:

> On February 11, 2015, a Judgment Entry — Decree of Divore was filed on this case. The Court hereby vacates the prior order, pursuant to Civil Rule 60(A), as it included a clerical error. The decision included the word "weekends" in error on page 9 of the decision. The Court will file a corrected Judgment Entry — Decree of Divorce contemporaneously with this Entry.

{¶ 3} Appellant filed her notice of appeal on March 19, 2015. The notice is timely with respect to the trial court's February 17, 2015 filings but not timely with respect to the trial court's February 11, 2015 filings. Pursuant to App.R. 4(A), a notice of appeal in a civil matter must be filed within 30 days of the final order appealed from. "Failure to comply with App.R. 4(A) is a jurisdictional defect and is fatal to any appeal." *Forman v. Lucas Cty. Court of Common Pleas*, 189 Ohio App.3d 678, 2010-Ohio-4731, ¶ 6 (10th Dist.).

{¶ 4} Appellee now moves to dismiss the appeal for lack of a timely filed notice of appeal, asserting that the February 11, 2015 judgment entry and decree of divorce was the final, appealable order in the matter, and the time to appeal is not extended by the subsequent filing of a nunc pro tunc entry. In the alternative, appellee argues that this court should limit the scope of the appeal and address only issues arising from the altered language in the second decision.

{¶ 5} Appellant opposes dismissal and argues that the trial court's earlier decision was vacated by the later one, and that the later decision thereby became the final appealable order in the case.

{¶ 6} For the following reasons, we conclude that the trial court's initial order is the sole appealable order in the case and we dismiss this appeal as untimely filed.

{¶ 7} A decree of divorce that resolves all issues in the case and determines the action is a final appealable order. *Park v. Park*, 10th Dist. No. 08AP-612, 2008-Ohio-6315. Neither party disputes that the initial February 11 decree here meets these criteria. From this uncontested premise, we apply the basic principle that a trial court that has issued a final appealable order in a case loses jurisdiction to vacate that order unless it proceeds under defined exceptions in the civil rules: "Succinctly stated, the Rules of Civil

Procedure specifically limit relief from judgments to motions expressly provided for within the same Rules. * * * * [T]he Civil Rules do allow for relief from final judgments by means of Civ.R. 50(B) (motion notwithstanding the verdict), Civ.R. 59 (motion for a new trial), and Civ.R. 60(B) (motion for relief from judgment)." *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 380 (1981) (addressing effect of purported motion for reconsideration).

{¶ 8} None of the procedural devices enumerated in *Pitts* was invoked in the present case. We can conclude that even if the trial court here intended to substantively modify or even fully vacate its earlier judgment, it lacked the power to do so and the later decision is a nullity in this respect. *Univ. v. Ellis*, 10th Dist. No. 13AP-711, 2014-Ohio-1491, ¶ 8, citing *Pitts*; *Miller v. Anthem*, 10th Dist. No. 00AP-275 (Dec. 12, 2000); *In re Matter of Helen's Inc.*, 10th Dist. No. 90AP-1027 (May 14, 1991).

{¶ 9} Nonetheless, while the trial court could not vacate or modify the substance of its February 11 order once it entered final judgment, it retained jurisdiction to correct clerical errors in the earlier decree. Despite the unfortunate use of the term "vacate" in the trial court's later entry, we find this is clearly what was intended. The court explicitly referred to Civ.R. 60(A), which governs the correction of clerical mistakes by means of a nunc pro tunc order and provides as follows:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

{¶ 10} CivR. 60(A) codifies the common law power of courts to enter nunc pro tunc orders. *Karnes v. Karnes*, 8th Dist. No. 94521, 2010-Ohio-4016, citing *Norris v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 05AP-762, 2006-Ohio-1750. The purpose of a nunc pro tunc entry is to have the judgment of the court reflect its true action. *McKay v. McKay*, 24 Ohio App.3d 74 (11th Dist.1985). "Civ.R. 60(A) permits a trial court, in its discretion, to correct clerical mistakes which are apparent on the record, but does not authorize a trial court to make substantive changes in judgments." *State ex rel. Litty v.*

Leskovyansky, 77 Ohio St.3d 97, 100 (1996). "The term 'clerical mistake' refers to a mistake or omission, mechanical in nature and apparent on the record which does not involve a legal decision or judgment." *Id.*; *see also Jacks v. Adamson*, 56 Ohio St. 397 (1897).

{¶ 11} Entry of a nunc pro tunc order should not be undertaken to show what the court might or should have decided but only to correctly reflect what it actually did decide. *Fed. Home Loan Mtge. Corp. v. LeMasters*, 10th Dist. No. 07AP-420, 2008-Ohio-4371, ¶ 16, citing *Webb v. W. Reserve Bond & Share Co.*, 115 Ohio St. 247 (1926). "The basic distinction between clerical mistakes that can be corrected under Civ.R. 60(A) and substantive mistakes that cannot be corrected is that the former consists of 'blunders in execution' whereas the latter consists of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because, on second thought, it has decided to exercise its discretion in a different manner." *Kuehn v. Kuehn*, 55 Ohio App.3d 245, 247 (12th Dist.1988) (citation omitted).

{¶ 12} Finally, because nunc pro tunc entries correct clerical rather than substantive errors, nunc pro tunc entries typically relate back to the date of the original entry and do not extend the time for an appeal. *State ex rel. Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229, ¶ 15, citing *State v. Yeaples*, 180 Ohio App.3d 720, 2009-Ohio-184, ¶ 15 (3d Dist.).

{¶ 13} Applied in their most absolute terms, the above authorities can be read for the ultimate proposition that once a final judgment is entered, nothing will extend the time to appeal. Pursuant to *Pitts*, the trial court lacks jurisdiction to substantially alter its first judgment by entering another, and pursuant to *Womack* any non-substantive changes properly effectuated through Civ.R. 60(A) do not extend the time to appeal. There exists, however, the possibility of circumstances that would make inequitable the application of this strict logic.

{¶ 14} This is because not all clerical errors are without impact on the merits. A misplaced digit or character can multiply a judgment tenfold, invert the parties, or defer accrual of interest into the next year. *See generally Robinson v. Target Corp.*, 10th Dist. No. 10AP-812, 2011-Ohio-2544, ¶ 31 (Bryant, J., dissenting); *Tejada v. Toledo Surgeons, Inc.*, 186 Ohio App.3d 465, 2009-Ohio-3495, ¶ 43 (6th Dist.). As a result, the

modification of a judgment under Civ.R. 60(A) cannot be characterized as improperly substantive under that rule merely because of its effect on a party. *Bobb Forest Prods. v. Morbark Industries, Inc.*, 151 Ohio App.3d 63, 77 (7th Dist.2002). " 'We can easily envision a simple scrivener's error in which, for example, an eight is transposed for a nine, resulting in an order that provides that payments are to increase effective 1895 instead of 1995. Is the trial court prevented from correcting this error pursuant to Civ.R. 60(A) because such correction would result in one party's loss of one hundred years worth of payments? We think not. It is the nature of the correction, rather than the effect of the correction which must be examined.' " *Id.*, quoting *Foster v. Foster*, 4th Dist. No. 96CA1767 (Sept. 23, 1997) (emphasis in *Bobb* omitted).

{¶ 15} In such cases, it is quite possible that a party that is not aggrieved by the original (erroneous) version of the trial court's judgment would have no grounds to timely appeal it, but then find itself out of rule and deprived of appeal when a clerically corrected (and now injurious) judgment is later entered nunc pro tunc. In a pre-rule case, the Ohio Supreme Court recognized as much and laid out a middle ground: "While this court will not permit a nunc pro tunc entry to so operate as to deprive a litigant of a right to appeal or prosecute error, on the right hand it will not allow a nunc pro tunc entry to so operate as to extend the period within which an appeal or error proceeding may be prosecuted, unless additional rights are created or an existing right denied by such nunc pro tunc entry, or unless the appeal or error proceeding grows out of such nunc pro tunc entry, as distinguished from the original order or entry." *Perfection Stove Co. v. Sherer*, 120 Ohio St. 445, 448-49 (1929); *See also Philip S. Mara, Inc. v. Columbus*, 10th Dist. No. 80AP-518 (Sept. 18, 1980).

{¶ 16} The Second District recently reprised these concerns with respect to Civ.R. 60(A): "The Ohio Supreme Court and the United States Supreme Court have recognized that a trial court's revision of a prior final judgment does not extend the time for appeal unless the appeal involves a new entry or the amended judgment changes matters of substance by creating new rights, denying existing rights, or resolving some genuine ambiguity. See *Perfection Stove Co. v. Sherer* (1929), 120 Ohio St. 445, 448-449; *Federal Trade Comm. v. Minneapolis-Honeywell Regulator Co.* (1952), 344 U.S. 206, 211-212." *Brush v. Hassertt*, 2d Dist. No. 21687, 2007-Ohio-2419, ¶ 10 (Brogan, J., rendering the

judgment of the court, with one judge concurring on different grounds and one judge dissenting).

{¶ 17} Leaving aside the line of federal cases engendered by *Minneapolis-Honeywell Regulator*, which are not subject to *Pitts* and may differ in procedural detail, we adopt the position set forth by *Brush* and consider that *Perfection Stove* is still the law on this specific point. The trial court's nunc pro tunc entry did not extend the time to appeal from the earlier judgment, *except* with respect to rights created or denied by the later clerical correction.

{¶ 18} Ultimately, we find in the present case that the trial court's February 17 judgment created no new rights. Neither party argues here that the trial court did more than correct an "error in execution," that the record did not establish that this reflected the original intent of the court, or that Civ.R. 60(A) was otherwise inapplicable. The two-word change does not "materially reduce companionship time with the minor child." *Wood v. Wood*, 11th Dist. No. 2009-P-0076, 2010-Ohio-2155, ¶ 23-24. Moreover, any reduction in visitation here seems to inure to the detriment of appellee, not appellant.

{¶ 19} The final, appealable order in the present case was the judgment entry and decree of divorce entered on February 11, 2015. The later nunc pro tunc entry created or denied no new rights that would extend the time to appeal under *Perfection Stove* and *Brush*. The notice of appeal is not timely, and the appeal must be dismissed.

Appeal dismissed.

BROWN, P.J., and BRUNNER, J., concur.

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