[Cite as *Fitzgerald v. Fitzgerald*, 2015-Ohio-3047.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
DARKE COUNTY

DANETTE FITZGERALD

Plaintiff-Appellant

v.

DAVID FITZGERALD

Defendant-Appellee

:
:

Appellate Case No. 15-CA-00003

Trial Court Case No. 13-DIV-00050

DECISION AND FINAL JUDGMENT ENTRY
June 26, 2015

PER CURIAM:

{¶ 1} Danette Fitzgerald appeals the January 5, 2015 "JUDGMENT ENTRY – Overruling Objections and Granting Decree of Divorce" issued by the Common Pleas Court of Darke County, Ohio. On March 17, 2015, this court ordered Appellant to show cause as to why this case should not be dismissed for lack of jurisdiction. It appeared that the order on appeal may not be final and appealable in accordance with R.C. 2505.02 and *Bennett v. Bennett*, 2d Dist. Clark No. 11CA52, 2012-Ohio-501, 969 N.E.2d 344. Specifically, it appeared that the trial court did not make its own order dividing property and resolving the other issues in the case, but instead simply adopted the magistrate's recommendation.

{¶ 2} On March 27, 2015, Appellant filed a response to the show cause order,

attaching a "Judgment Entry/Decree of Divorce" filed in the trial court on March 26, 2015. The Entry purports to be nunc pro tunc back to January 5, 2015. Appellant asks this court not to dismiss her appeal, but to continue this appeal based on the nunc pro tunc Entry.

{¶ 3} Upon consideration, we must dismiss this appeal for lack of a final appealable order pursuant to the *Bennett* case. *Bennett* provides:

> A trial court must render its own separate judgment and may not simply state that it approves, adopts, or incorporates a magistrate's decision. A judgment entry is not sufficient if it merely recites that a recommendation/decision is approved and adopted thereby requiring the parties to refer to another document in order to determine exactly what their rights and obligations are. It has been said that ' * * * the judgment entry must be worded in such a manner that the parties can readily determine what is necessary to comply with the order of the court' and need not resort to any other documents. Accordingly, for a judgment entry of the court to be a final appealable order, it must adopt, reject, or modify the magistrate's decision and state, for identification purposes, the date the magistrate's decision was filed. It should state the outcome and contain an order which states the relief granted so that the parties are able to determine their rights and obligations by referring solely to the judgment entry and should be a document separate from the magistrate's decision.

Bennett at ¶ 20 (internal quotations and citations omitted).

{¶ 4} Here, in the January 5, 2015 decision, the trial [court] adopts the

magistrate's decision but does not make its own orders dividing property or resolving the other issues in the case. Pursuant to *Bennett*, the order is not a final appealable order.

{¶ 5} We appreciate that the parties have attempted to resolve this issue by seeking the trial court's signature on the March 26, 2015 Judgement Entry. However, the Ohio Supreme Court has "consistently held that once an appeal is perfected, the trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment." *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas,* 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149, ¶ 13 (internal quotation omitted). Further,

> a trial court cannot file a nunc pro tunc entry while a case is pending on appeal. *See, e.g., State v. Erlandsen*, Allen App. No. 1-02-46, 2002-Ohio-4884, n. 1 ("The nunc pro tunc entry was void ab initio as the trial court no longer has jurisdiction to enter any judgment in a case once an appeal has been taken."); *State v. Reid* (Sept. 18, 1998), Lucas App. No. L-97-1150 ("Since this judgment was issued subsequent to the filing of the notice of appeal, the trial court was without jurisdiction to take any action which might affect issues on appeal; therefore, the nunc pro tunc judgment entry is void."); *State v. Rowland*, Hancock App. No. 5-01-39, 2002-Ohio-1421 ("[A]s Rowland filed his appeal on July 13, 2001, the trial court no longer had jurisdiction to reduce Rowland's sentence. Accordingly, the State's assignment of error is well taken and the September 17, 2001, Nunc Pro Tunc Judgment Entry must therefore be disregarded."); *State v. Biondo*, Portage App. No.2009-P-0009, 2009-Ohio-7005, ¶ 18 (" * * *

> Biondo's motion sought a 'correction' of the original judgment as a means of having his post-release control vacated. Not only did such a request have substantive implications, it was completely inconsistent with this court's ability to reverse, modify, or affirm the March 28, 2008 judgment which denied the same relief. Accordingly, the nunc pro tunc entry issued on September 18, 2008, is void as the trial court lacked subject matter jurisdiction over Mr. Biondo's motion.").

State v. Smith, 2d Dist. Greene No. 2010-CA-63, 2011-Ohio-5986, ¶ 9. "Based on the foregoing authority, we are compelled to conclude that the trial court's nunc pro tunc entry had no legal effect." *Id*. at ¶ 10.

{¶ 6} Here, the trial court's March 26, 2015 Judgment Entry, entered during the pendency of this appeal, has no effect on this appeal and does not provide a final appealable order from which this appeal can proceed. *Id*. The fact that this appeal will be dismissed for lack of jurisdiction does not change this result. *Electronic Classroom* at ¶ 15-17.

{¶ 7} Should the trial court reissue a final appealable order after this appeal is dismissed, the parties may file a new appeal from that order.

{¶ 8} Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Darke County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

SO ORDERED.

JEFFREY E. FROELICH, Presiding Judge

MARY E. DONOVAN, Judge

JEFFREY M. WELBAUM, Judge

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