[Cite as *Brannon v. Persons*, 2016-Ohio-7980.]

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

DWIGHT D. BRANNON, et al.

Plaintiffs-Appellees

v.

DONNA K. PERSONS, et al.

Defendants-Appellant

Appellate Case No. 27151

Trial Court Case Nos. 2015 CV 01473
2015 CV 03889

(Civil Appeal from the
Common Pleas Court)

DECISION AND FINAL JUDGMENT ENTRY
November 1, 2016

PER CURIAM:

{¶ 1} Donna K. Persons appealed the May 2, 2016 "Orders on Motions for Summary Judgment" (hereinafter, the "Orders") entered by the trial court in the consolidated underlying cases. Because the Orders are not final and appealable, we dismiss this appeal.

{¶ 2} The two underlying cases included malpractice claims by Persons against her former attorneys, Dwight D. Brannon and Matthew C. Schultz, and claims by Brannon and Schultz against Persons to enforce a contingent fee agreement and receive payment out of a negotiated but unpaid settlement. On May 2, 2016, in the Orders, the trial court

found in favor of Brannon and Schultz on all issues. The court continued: "The proceeds of the settlement shall be placed into an account with the Clerk of Courts to be distributed at a later time pursuant to a further finding by the Court."

{¶ 3} Persons appealed the May 2, 2016 Orders on June 21, 2016. Brannon and Schultz filed a motion to dismiss the appeal that same day. Brannon and Schultz argue that the Orders are not final and appealable, and that if they were, the notice of appeal was filed too late to appeal them. Persons filed a response to the motion on June 30, 2016, arguing that the Orders affected her substantial and procedural rights; that the appeal raised questions of law pursuant to R.C. 2501.02 over which this court has jurisdiction; that the Orders are contrary to Ohio Supreme Court precedent; and that she was overwhelmed by prescribed medication and was unable to timely file the notice of appeal. Persons also includes a list of what appear to be assignments of error or issues she wishes to raise on appeal. She further argues that she is entitled to a stay as a matter of right pursuant to Civ.R. 62. Brannon and Schultz filed a reply on July 12, 2016, reiterating their arguments and noting that the trial court scheduled a hearing to determine the final distribution of the proceeds.

{¶ 4} We conclude that the motion to dismiss is well-taken. The Orders are not final and appealable, and we lack jurisdiction to review them. This appeal will therefore be dismissed.

Brannon and Schultz's Contract Action against Persons:

The Orders are not final and appealable under R.C. 2505.02

{¶ 5} An appellate court has jurisdiction to review only final orders or judgments of the lower courts in its district. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02.

We have no jurisdiction to review an order or judgment that is not final, and an appeal therefrom must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989). To determine if an order is final and appealable, we look to R.C. 2505.02, which, as relevant to Persons' argument, provides that "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is * * * [a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment * * *." R.C. 2505.02(B)(1).

{¶ 6} "For 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." *Miller v. First Internatl. Fid. & Trust Bldg., Ltd.*, 113 Ohio St.3d 474, 2007-Ohio-2457, 866 N.E.2d 1059, ¶ 6 (internal citations omitted). "[W]here the issue of liability has been determined, but a factual adjudication of relief is unresolved, the finding of liability is not a final appealable order * * *." *Noble v. Colwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989). Such orders do not satisfy R.C. 2505.02(B)(1) "because they do not determine the action or prevent a judgment." *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 546, 684 N.E.2d 72 (1997), citing *State ex rel. A & D Ltd. Partnership v. Keefe*, 77 Ohio St.3d 50, 53, 671 N.E.2d 13 (1996).

{¶ 7} The Orders here do not fully determine the contract action, although they do determine that the contract is binding. The trial court did not determine damages or order relief on Brannon and Schultz's claims. Rather, the trial court contemplated further action, i.e., a "further finding by the court" about how the funds should be distributed. The Orders, which do not fully determine all the claims in the contract case or prevent a judgment, are

therefore not final and appealable. *See* R.C. 2505.02(B)(1); *Brown v. Potter*, 2d Dist. Montgomery Nos. 26774, 26775, 2015-Ohio-4289, ¶ 2 (summary judgment decision not final where it contemplated an additional judgment entry after hearing from a party about requested relief); *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 20 (a judgment that leaves issues unresolved and contemplates further action is not a final appealable order).

{¶ 8} Persons argues that the Orders affected her substantial rights by awarding Brannon and Schultz the full amount under the contingency fee contract, and that the Orders are therefore final. We disagree. As of the date of the Orders, the trial court had not yet awarded any amount under the contract, and Persons' substantial rights had not yet been affected. Even if Persons' substantial rights were affected by the Orders, the test also requires that the order "in effect determine[] the action and prevent[] a judgment" to be considered final. R.C. 2505.02(B)(1). As discussed in the preceding paragraphs, the action was not fully determined without an order ordering relief on the contract claims. The Orders are therefore not final and appealable as to the contract claims. The motion to dismiss is well-taken on this ground.

Persons' Malpractice Action against Brannon and Schultz:

The trial court did not include Civ.R. 54(B) language

{¶ 9} In granting summary judgment to Brannon and Schultz on all of Persons' claims, the trial court did fully resolve those claims. *See Tucker v. Pope*, 2d Dist. Miami No. 2009 CA 30, 2010-Ohio-995, ¶ 25 (generally, a "decision granting a [defendant's] motion for summary judgment on all of a plaintiff's claims is a final appealable order"). Civ.R. 54(B) permits a trial court to "enter final judgment as to one or more but fewer than

all of the claims," but "only upon an express determination that there is no just reason for delay." Claims in consolidated cases are considered together. *See Whitaker v. Kear*, 113 Ohio App. 3d 611, 681 N.E.2d 973 (4th Dist. 1996) (holding that claims in consolidated cases are not individually appealable absent Civ.R. 54(B) language). The Ohio Supreme Court has held that "Rule 54(B) makes mandatory the use of the language, 'there is no just reason for delay.' Unless those words appear where multiple claims and/or multiple parties exist, the order is subject to modification and it cannot be either final or appealable." *Noble v. Colwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989).

{¶ 10} Here, the two cases were consolidated. Although Persons' claims were resolved, Brannon and Schultz's claims were not, as discussed above. The Orders do not contain a determination that "there is no just reason for delay," and the claims that were fully resolved may not be separately appealed at this time. *Brown v. Good Samaritan Hosp. & Health Care Ctr.*, 2d Dist. Montgomery No. 15959, 1997 WL 165431, *6 (Mar. 21, 1997).

Arguments Concerning Both Cases:

The notice of appeal was timely filed

{¶ 11} Brannon and Schultz argue in the alternative that if the Orders are final and appealable, Persons filed her notice of appeal too late to appeal them. We disagree. While App.R. 4(A)(1) provides that "a party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry," the rule contains a limited exception. "In a civil case, if the clerk has not completed service of the order within the three-day period prescribed in Civ.R. 58(B), the 30-day periods referenced in App.R. 4(A)(1) * * * begin to run on the date when the clerk

actually completes service." App.R. 4(A)(3).

{¶ 12} Civ.R. 58(B) requires action by both the trial court and the clerk to complete service:

> When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. *Upon serving the notice and notation of the service in the appearance docket, the service is complete.* The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

(Emphasis added). Civ.R. 58(B).

{¶ 13} In this case, the May 2, 2016 Orders do not contain an endorsement from the trial court directing the clerk to serve the parties with the judgment, likely because the trial court correctly considered the Orders not to be final. Likewise, the dockets filed in this court on July 11, 2016 and July 12, 2016 do not reflect that the clerk served the parties and entered a notation of service on the docket. Therefore, service was not "complete" under Civ.R. 58(B) and App.R. 4(A)(3), and "the time for filing a notice of appeal never began to run." *In re Anderson*, 92 Ohio St.3d 63, 67, 748 N.E.2d 67 (2001). While Persons may have known about the Orders, "[a]ctual knowledge of a judgment is not a sufficient substitute for service of notice of the judgment by the clerk of court's office." *Clermont Cty. Transp. Improvement Dist. v. Gator Milford, L.L.C.*, 141 Ohio St.3d 542,

2015-Ohio-241, 26 N.E.3d 806, ¶ 2. We conclude that the notice of appeal was timely.

This court can only review questions of law where there is a final order

{¶ 14} Persons argues that this court has jurisdiction to review questions of law pursuant to R.C. 2501.02, which provides in relevant part:

> In addition to the original jurisdiction conferred by Section 3 of Article IV, Ohio Constitution, the court shall have jurisdiction upon an appeal upon *questions of law* to review, affirm, modify, set aside, or reverse judgments or final orders of courts of record inferior to the court of appeals within the district * * *.

(Emphasis added.) We agree with Persons' argument in part; this court does indeed have jurisdiction to review questions of law. However, questions of law are only reviewable after "final orders of courts of record" are issued. R.C. 2501.02 must be read together with R.C. 2502.02, which defines final orders. In other words, R.C. 2501.02 gives this court jurisdiction to review final orders, and R.C. 2502.02 tells us which orders are final. Because the Orders in this case do not satisfy R.C. 2502.02, they are not final and may not be reviewed pursuant to our authority under R.C. 2501.02.

This court cannot review the merits of the underlying action

{¶ 15} Persons includes arguments concerning the merits of the underlying case. "Whether an order from which an appeal has been taken is immediately appealable is a threshold issue that must be determined, conceptually at least, before the determination of the appeal on its merits." *Premier Health Care Services, Inc. v. Schneiderman*, 2d Dist. Montgomery No. 18795, 2001 WL 1479241, *2 (Aug. 21, 2001), citing *State v. Coffman*, 91 Ohio St.3d 125, 129, 742 N.E.2d 644. Once the trial court enters a final appealable

order, and a new, timely appeal is filed, Persons may make her arguments on the merits.

This court cannot grant Persons a stay

{¶ 16} As discussed above, the appeal must be dismissed because this court lacks jurisdiction. "[A] court lacking jurisdiction over an appeal also lacks jurisdiction to issue a stay pending that appeal." *State ex rel. McGinty v. Eighth Dist. Court of Appeals*, 142 Ohio St.3d 100, 2015-Ohio-937, 28 N.E.3d 88, ¶ 13. We also observe that if there is no appeal pending, "a stay pending the Appeal is no longer appropriate." *State ex rel. Northeastern Local Bd. of Edn. v. Rastatter*, 2d Dist. Clark No. 16CA0004, 2016-Ohio-7103, ¶ 23, citing *Huntington Natl. Bank v. Payson*, 2d Dist. Montgomery No. 26396, 2015-Ohio-1976, ¶ 28.

Sanctions under App.R. 23

{¶ 17} In their motion to dismiss, Brannon and Schultz ask this court to impose sanctions on Persons for filing a frivolous appeal. We decline to do so. Costs, however, are taxed to Persons pursuant to App.R. 24(A)(1).

Conclusion

{¶ 18} Brannon and Schultz's motion to dismiss is SUSTAINED. Because the Orders on appeal are not final and appealable, we DISMISS this appeal. Persons may file a new notice of appeal and ask that the record be transferred into the new appeal once the trial court enters a final order fully resolving the underlying cases.

{¶ 19} Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery 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.

MIKE FAIN, Judge

JEFFREY M. WELBAUM, Judge

MARIE CORAZON MORALEJA HOOVER, Judge
(Sitting by assignment of the Chief Justice of the Supreme Court of Ohio)

Copies to:

Donna Persons
2939 Tubman Avenue
Dayton, Ohio 45417
Appellant

Dwight Brannon
Matthew Schultz
130 W. Second Street, Suite 900
Dayton, Ohio 45402
Appellees
Attorneys for Appellees, Dwight Brannon and Matthew Schultz

Arthur Phelps
600 Vine Street, Suite 2650
Cincinnati, Ohio 45202
Attorney for Appellees, Central Foot & Ankle Specialists and Leslie Cowden

Laurence Lasky
130 W. Second Street, Suite 830
Dayton, Ohio 45402
Attorney for Appellee, Mehr Investments

Hon. Dale A. Crawford, Visiting Judge
Montgomery County Common Pleas Court
41 N. Perry Street
P.O. Box 972
Dayton, Ohio 45422

CA3/KY