[Cite as *Bapst v. Goodwin*, 2009-Ohio-6244.]

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

MAXIE BAPST, et al.,	:	
Plaintiffs-Appellants,		Case No. 08CA780
vs.	:	
DUDLEY GOODWIN, et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellees.	:	

APPEARANCES:

COUNSEL FOR APPELLANTS:	Steven C. Newman, 37 North Paint Street, Chillicothe, Ohio 45601
COUNSEL FOR APPELLEES, DUDLEY GOODWIN AND DONNA GOODWIN:	Steven K. Nord and Ryan Q. Ashworth, Offutt Nord, PLLC, 949 Third Avenue, Ste. 300, P.O. Box 2868, Huntington, West Virginia 25728-2868
COUNSEL FOR APPELLEES, MILLER & PERKINS, INC., PAUL PERKINS AND TERRY ELLIOTT:	Regan Tirone, 36 East Seventh Street, Ste. 2420, Cincinnati, Ohio 45202

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 11-16-09

PER CURIAM.

{¶ 1} This is an appeal from a Pike County Common Pleas Court summary judgment in favor of Dudley and Donna Goodwin (Goodwins), Miller & Perkins, Inc., Paul Perkins and Terry Elliot (excavators), defendants below and appellees herein, on claims against them brought by Maxie Bapst and Dorothy Bapst, plaintiffs below and

appellants herein.

{¶ 2} Appellants assign the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DETERMINING THERE EXISTED NO GENUINE ISSUES OF MATERIAL FACT AS RELATING TO THE PLAINTIFF-APPELLANT'S ALLEGATION THAT THE DEFENDANT-APPELLEES UNREASONABLY INTERFERED WITH THE NATURAL FLOW OF SURFACE WATER IN GRANTING DEFENDANT-APPELLEES' MOTION FOR SUMMARY JUDGMENT."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN CLASSIFYING ITS DECISION A FINAL APPEALABLE ORDER DUE TO THE LACK OF AN EXPRESSED DETERMINATION THAT THERE IS NO JUST REASON FOR DELAY AS REQUIRED PURSUANT TO RULE 54(B), OHIO RULES OF CIVIL PROCEDURE."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT-APPELLEES' MOTION FOR SUMMARY JUDGMENT IN REGARD TO PLAINTIFF-APPELLANTS' CLAIM OF AN IMPLIED EASEMENT BY FINDING THAT THERE EXISTED NO GENUINE ISSUE AS TO ANY MATERIAL FACT."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT-APPELLEES' MOTION FOR SUMMARY JUDGMENT IN REGARD TO PLAINTIFF-APPELLANTS' CLAIM OF AN EASEMENT BY PRESCRIPTION BY FINDING THAT THERE EXISTED NO GENUINE ISSUE AS TO ANY MATERIAL FACT."

{¶ 3} Appellants and the Goodwins are contiguous property owners along

Beaver Pike Road. In 1999, the Goodwins hired the excavators to grade their land and to make other improvements. In the course of that work, the excavators unearthed and damaged a concrete slab and culvert that apparently carried drainage from appellants' property. As a result, water now backs up onto appellants' property and, among other things, floods their basement.

{¶ 4} Appellants commenced the instant action on May 3, 2000 and asserted various claims against the Goodwins. Appellants requested damages as well as injunctive relief. The Goodwins denied liability. In the interim, this case has involved three judges, numerous changes of attorneys, two mediation referrals, several amended complaints (one added the excavators as defendants) and a number of motions and cross-motions for summary judgment (the first round were all denied).

{¶ 5} The matter now comes to us now by way of a 2006 "supplement" the Goodwins filed to an earlier motion for summary judgment.[1] This supplement, for the most part, focused on the drain pipe and argued that appellants had no easement (merely a verbal license) for the pipe to exist. Thus, appellants had no legally enforceable right in drainage across their property. The Goodwins thus argued that they and the excavators are entitled to judgment in their favor as a matter of law. Appellants filed an opposing memorandum.

{¶ 6} Subsequently, the trial court filed a "decision and journal entry" that

[1] It is not entirely clear the motion that this filing was meant to "supplement." Our review of the voluminous record indicates that the last summary judgment motion was filed by the excavators on November 24, 2004. On January 20, 2005, the Goodwins simply filed a notice of "joinder" to that motion. The case received a second referral to mediation in May 2005, and, except for a few procedural matters, nothing

granted "defendants' motion for summary judgment."[2] The court reasoned in its decision that appellants have no easement over the Goodwins' property and that "defendants" (presumably, the excavators) only owed them a duty to take "reasonable care" which was discharged. Although the court granted the motion, it did not make any actual disposition of the case.

{¶ 7} On April 9, 2008 the trial court filed a "nunc pro tunc" decision and "journal entry." The only difference between this decision and the one from the previous month was the addition of language to alert the parties that this decision is a final appealable order. Again, there was no formal order of disposition in this "journal entry." This appeal followed.

{¶ 8} Before we address the merits of this case, we must first address a threshold jurisdictional problem. Ohio courts of appeals only have appellate jurisdiction to review "final orders" of inferior courts within their district. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.03(A). A final order is one that, inter alia, actually disposes of the case. See State Auto. Mut. Ins. Co. v. Titanium Metals Corp., 108 Ohio St.3d 540, 844 N.E.2d 1199, 2006-Ohio-1713, at ¶10. If a judgment is not final and appealable, we have no jurisdiction to review the matter and the case must be dismissed. Mortgage. Electronic Registration Sys. v. Mullins, 161 Ohio App.3d 12, 2005-Ohio-2303, 829 N.E.2d 326, at ¶ 17; Prod. Credit Assn. v. Hedges (1993), 87

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was filed until May 2006.

[2] The trial court did not specify whether the summary judgment was in favor of the Goodwins pursuant to their "supplement," or to the excavators who filed the last actual motion for summary judgment, or to all defendants involved in this matter. We certainly recognize that the voluminous file is very confusing.

Ohio App.3d 207, 210, 621 N.E.2d 1360, fn. 2; Kouns v. Pemberton (1992), 84 Ohio App.3d 499, 501, 617 N.E.2d 701.

{¶ 9} In the case sub judice, we do not believe either the March 7, 2008 "Decision and Journal Entry" or the April 9, 2008 nunc pro tunc "Decision and Journal Entry" fully disposes of the case. Both documents appear to be decisions on a motion for summary judgment, but do not dismiss the case or enter judgment for the victorious parties. Ordinarily, judgments set out the rights of the parties to a lawsuit. See Minix v. Collier (Jul. 16, 1999), Scioto App. No. 98CA2619. Any document that purports to constitute a judgment should contain sufficient language to terminate the action. See Vanest v. Pillsbury, Co. (1997) 124 Ohio App.3d 525, 534, 706 N.E.2d 825, at fn. 4; McCall v. Ohio State Racing Comm. (Dec. 14, 1993), Franklin App. No. 93APE09-1216. A decision, however, is not a judgment from which an appeal will lie. Laws v. Board of Liquor Control (1958), 106 Ohio App. 233, 236, 153 N.E.2d 165.

{¶ 10} Here, the entries do not dispose of the case and, therefore, cannot be considered to be final orders. Further, neither assesses court costs pursuant to Civ.R. 54(D) and this further illustrates that they do not constitute final orders over which this Court has jurisdiction.

{¶ 11} Moreover, even if we assume arguendo that the decisions had met requirements of a judgment, we would not find them to be final and appealable. As appellants note in their second assignment of error, the trial court did not address the claim that the Goodwins altered the flow of surface water on their property. Paragraph seven of the complaint alleged not only the obstruction of the drain pipe that caused damage to their property, but also the elevation of land that caused a change to the

flow of surface rain water. However, the March 7, 2008 decision and the April 9, 2008 decision only address the question of an easement and damage to the drain pipe. The only context in which the claim of damage to the flow of surface water was addressed was with regard to the excavators and the work they performed. This, however, did not address the issue as far as the Goodwins were concerned.[3]

{¶ 12} For all of these reasons, we conclude that the "judgment" appealed herein does not constitute a final appealable order and we have no jurisdiction over the matter. Accordingly, the appeal is hereby dismissed.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the appeal be dismissed and that the parties split the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Kline, P.J. & Harsha, J.: Concur in Judgment Only
Abele, J.: Concurs in Judgment & Opinion

For the Court

[3] Having determined the judgment appealed herein is not a final appealable order for these two reasons, we need not and do not address the issues appellants raise that the trial court failed to address their other claims for nuisance, trespass and negligence.

BY: _____
Roger L. Kline
Presiding Judge

BY: _____
William H. Harsha, Judge

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.