

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THOMAS R. SNYDER	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-00293
CYNTHIA SNYDER	:	
	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of
Common Pleas, Case No. 2009CV00767

JUDGMENT: Dismissed

DATE OF JUDGMENT ENTRY: July 19, 2010

APPEARANCES:

For: Thomas Snyder

For: Cynthia Snyder

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Gwin, P.J.

{¶1} Plaintiff Thomas R. Snyder appeals a judgment of the Court of Common Pleas of Stark County, Ohio, granted in favor of defendant-appellee Cynthia Snyder. For the reasons that follow, we find we lack jurisdiction to review the case.

{¶2} Appellant brought three claims against appellee: perjury, tampering with evidence, and defamation. Appellee filed a motion for judgment on the pleadings pursuant to Civ. R. 12 (C), requesting dismissal of the perjury and tampering with evidence claims. The trial court sustained the motion, finding Ohio does not recognize a civil cause of action for perjury or for tampering with evidence. Thereafter, appellant dismissed his defamation claim without prejudice pursuant to Civ. R. 41, and brought the instant appeal.

{¶3} Section 3(B)(2), Article IV of the Ohio Constitution limits an appellate court's jurisdiction to the review of final judgments. An order adjudicating "one or more but fewer than all the claims or the rights and liabilities of fewer than all the parties must meet the requirements of R.C. 2505.02 and Civ. R. 54(B) to be final and appealable." *Noble v. Colwell* (1989), 44 Ohio St.3d 92, at syllabus. This court has "no choice but to sua sponte dismiss an appeal that is not from a final appealable order." *Whitaker-Merrell v. Geupel Construction Co.* (1972), 29 Ohio St.2d 184, 58 O.O.2d 399, 280 N.E.2d 922.

{¶4} R.C. 2505.02 provides in pertinent part:

{¶5} " (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶6} (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment; ***”

{¶7} Civ. R. 54 (B) states:

{¶8} “When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however, designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”

{¶9} The judgment appealed from does not dispose of all the claims between the parties, but appellant subsequently dismissed the remaining count of the complaint without prejudice.

{¶10} In the case of *Lovins v. Kroger Company*, 150 Ohio App. 3d 656, 2002-Ohio-6526, 782 N.E. 2d 1171, the Court of Appeals for Montgomery County found an order granting a voluntary dismissal without prejudice is not an adjudication on the merits and is not a final appealable order. *Lovins* at paragraph 4, citing *Hutchins v. Delco Chassis* (February 7, 1997), Montgomery App. No. 15953; *Christian v. McFarland* (June 20, 1997), Montgomery App. No. 15984. The *Lovins* court noted after a voluntary

dismissal without prejudice, the action is treated as if it had never been filed. Id., citing *Giambrone v. Spaulding & Evenflo, Inc.* (April 18, 1997), Miami App. No. 96CA08.

{¶11} We find the judgment appealed from is not a final appealable order, and accordingly, the matter is dismissed for lack of jurisdiction.

By Gwin, J., and

Edwards, P.J., concur;

Hoffman, J., concurs

separately

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

WSG:clw 0625

Hoffman, J., concurring

{¶12} I concur in the result reached by the majority. However, I find the majority's reliance on *Lovins v. Kroger Co.*, 2002-Ohio-6526, unpersuasive. *Lovins* is significantly procedurally distinguishable from the case subjudice as it involved an attempt by plaintiffs therein to voluntarily dismiss their complaint after an adverse arbitration award. It is noteworthy the *Lovin's* court found "Despite the foregoing rule, we conclude, under the unusual facts of the present case, that the trial court's order denying Kroger's motion to strike the appellees' notice of voluntary dismissal is a final, appealable order under R.C. 2505.02(B)(1)." *Id.* at ¶5.

{¶13} In *Lovins*, the plaintiffs attempted to voluntarily dismiss their entire complaint. Such is not the case here.

{¶14} Nevertheless, I concur in the decision to dismiss this appeal. When a court dismisses fewer than all claims against a defendant, as the trial court did in this case, a plaintiff may not create a final order by voluntarily dismissing the remaining claims(s) asserted against that defendant, because Civ.R. 41(A)(1) authorizes dismissal of "all claims" not of only some. *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St. 3d 142, 2008-Ohio-5276.

HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

THOMAS R. SNYDER

Plaintiff-Appellant

-VS-

CYNTHIA SNYDER

Defendant-Appellee

JUDGMENT ENTRY

CASE NO. 2009-CA-00293

For the reasons stated in our accompanying Memorandum-Opinion, the within appeal dismissed. Costs to appellant.

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN