[Cite as *Wilkshire Communications, Inc. v. Hollinger-Yohe, Ins. Agency, Inc.*, 2015-Ohio-2371.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
WILKSHIRE COMMUNICATIONS, INC.	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
Plaintiff-Appellee	:	
	:	
-vs-	:	Case No. 2014 AP 06 0024
	:	
HOLLINGER-YOHE, INSURANCE AGENCY, INC., ET AL	:	O P I N I O N
Defendants-Appellants		

CHARACTER OF PROCEEDING:	Civil appeal from the Tuscarawas County Court of Common Pleas, Case No. 2012 CV 07 0685
JUDGMENT:	Dismissed
DATE OF JUDGMENT ENTRY:	June 11, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
PAUL HERVEY STEVE ANDERSON 140 Fair Avenue N.W., Box 1014 New Philadelphia, OH 44663	ELIZABETH BURICK 1428 Market Avenue North Canton, OH 44714

Gwin, P.J.

{¶1} Appellants appeal the May 27, 2014 judgment entry awarding a judgment to Matthew Hollinger upon Count V of the complaint in the amount of $36,000 and denying appellants' counterclaim.

Facts & Procedural History

{¶2} On July 27, 2012, appellee Wilkshire Communications, Inc. filed a complaint against appellants Hollinger-Yohe Insurance Agency, Inc. and Matthew Hollinger for breach of contract, negligence, malpractice, promissory estoppel, and for judgment upon a promissory note. In Count V, appellee alleged that appellants entered into a promissory note in which appellants agreed to pay. Appellee sought judgment against appellants on Count V jointly and severally.

{¶3} On October 5, 2012, appellant Hollinger-Yohe Insurance Agency filed a counterclaim against appellee, arguing that it loaned appellee $30,000 that had not been repaid. On July 18, 2013, Fairway Lawn Care and Landscaping LLC was joined as a party based upon appellee's assignment of claim to them.

{¶4} The trial court conducted a bench trial on appellee's complaint and appellants' counterclaim. During the bench trial and at the conclusion of appellee's case-in-chief, the trial court orally dismissed appellee's Counts I through IV due to the failure to prove monetary damages. The trial court indicated that it would reduce the judgment on those counts to writing at the appropriate time. In a post-trial briefing schedule, the trial court again indicated it was going to dismiss Counts I – IV, but deferred any judgments or verdicts to consider post-trial legal memoranda.

{¶5} On May 27, 2014, the trial court issued a judgment entry. The trial court found in favor of appellee on Count V of the complaint against appellant Matthew Hollinger in the amount of $36,000. The trial court also denied appellants' counterclaim against appellee.

{¶6} Appellants appeal the May 27, 2014 judgment entry of the trial court and assign the following as error:

{¶7} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT THE WRITING MARKED AS EXHIBIT "J" DATED JANUARY 23, 2012 WAS A PROMISSORY NOTE.

{¶8} "II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RELIED ON EXTRINSIC EVIDENCE TO SUPPLEMENT THE WRITING BETWEEN APPELLEES AND APPELLANTS AND ADDED TERMS THAT WERE NOT INCLUDED WITHIN THE FOUR CORNERS OF THE WRITTEN DOCUMENT."

Final Appealable Order

{¶9} As a preliminary matter, we must first determine whether the order under review is a final, appealable order. If an order is not final and appealable, then we have no jurisdiction to review the matter and must dismiss it. See *Gen. Acc. Ins. Co. v. Ins. Co. of N. America*, 44 Ohio St.3d 17, 540 N.E.2d 266 (1989). In the event that the parties to the appeal do not raise this jurisdictional issue, we may raise it sua sponte. See *Chef Italiano Corp. v. Kent State University*, 44 Ohio St.3d 86, 541 N.E.2d 64 (1989); *Whitaker-Merrell Co. v. Geupel Constr. Co.*, 29 Ohio St.2d 184, 280 N.E.2d 922 (1972).

{¶10} To be final and appealable, an order must comply with R.C. 2505.02 and Civ.R. 54(B), if applicable. R.C. 2502.02(B) provides the following in pertinent part:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, without or without retrial, when it is one of the following:
>
> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
>
> (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment. * * *

{¶11} To qualify as final and appealable, the trial court's order must satisfy the requirements of R.C. 2505.02, and if the action involves multiple claims and/or multiple parties and the order does not enter judgment on all the claims and/or as to all parties, as is the case here, the order must also satisfy Civil Rule 54(B) by including express language that "there is no just reason for delay." *Int'l. Brotherhood of Electrical Workers, Local Union No. 8 v. Vaughn Indus., LLC*, 116 Ohio St.3d 335, 2007-Ohio-6439, 879 N.E.2d 101. However, we note that "the mere incantation of the required language does not turn an otherwise non-final order into a final appealable order." *Noble v. Colwell*, 44 Ohio St.3d 92, 540 N.E.2d 1381 (1989).

{¶12} In this case, according to the transcript, it appears that the trial judge orally dismissed Counts I – IV of appellee's complaint. However, the trial court never incorporated this oral statement dismissing these counts into a judgment entry. It is well-settled that a court of record speaks only through its journal entries. *Schenley v. Kauth*, 160 Ohio St. 109, 113 N.E.2d 625 (1953). In a post-trial briefing schedule, the

trial court indicated it was going to dismiss Counts I – IV, but deferred any judgments or verdicts to consider post-trial legal memoranda. Accordingly, these claims remain pending. As the trial court failed to journalize its judgment with respect to these claims, no final, appealable order exists. See *Pettit v. Glenmoor Country Club, Inc.*, 5th Dist. Stark No. 2012-CA-00088, 2012-Ohio-5622.

{¶13} Further, while the trial court's judgment entry finds for appellee against appellant Matthew Hollinger, there is no reference in the judgment entry regarding appellee's claim against appellant Hollinger-Yohe Insurance Agency. In its complaint, appellee sought judgment against appellants Matthew Hollinger and Hollinger-Yohe Insurance Agency on Count V, jointly and severally. Accordingly, the claim against Hollinger-Yohe Insurance remains pending and no final, appealable order exists.

{¶14} While the trial court's judgment entry states that "there is not just cause for delay," we note, as is stated above, that a finding that there is no just cause for delay does not transform a non-final order into a final appealable order. *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 617 N.E.2d 1136 (1993), citing *Chef Italiano Corp. v. Kent State University*, 44 Ohio St.3d 86, 541 N.E.2d 64 (1989); *Pettit v. Glenmoor Country Club, Inc.*, 5th Dist. Stark No. 2012-CA-00088, 2012-Ohio-5622.

{¶15} Based on the foregoing, the judgment appealed from is not a final, appealable order and this Court, therefore, lacks jurisdiction to address the assignments of error. Accordingly, the appeal is dismissed.

By Gwin, P.J.,

Hoffman, J., and

Delaney, J., concur