[Cite as *Onady v. Wright State Physicians, Inc.*, 2018-Ohio-3096.]

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

GARY ONADY, M.D.

Plaintiff-Appellee /
Cross-Appellant

v.

WRIGHT STATE PHYSICIANS, INC.

Defendants-Appellant /
Cross-Appellees

:Appellate Case No. 27954

Trial Court Case No. 2012 CV 07251

DECISION AND ENTRY
July 20, 2018

PER CURIAM:

{¶ 1} This matter is before the court for resolution of our show cause order. The underlying case arose when Gary Onady, M.D. ("Dr. Onady") filed suit against Wright State Physicians, Inc. (WSP) asserting the following claims: (1) breach of contract; (2) retaliation in violation of Ohio's Whistleblower Statute; (3) intentional interference with contract; and (4) retaliation in violation of public policy. Other claims and other parties were previously involved in the case but had been dismissed by the time the order on appeal was entered.

{¶ 2} WSP moved for summary judgment in its favor on Dr. Onady's four remaining claims. On March 28, 2018, the trial court dismissed two of Dr. Onady's claims, but allowed two claims to proceed to a jury. The trial court certified that there was no just reason for delay pursuant to Civ.R. 54(B).

{¶ 3} Specifically, the trial court granted WSP's motion for summary judgment on Dr. Onady's whistleblower claim and his claim for tortious interference with a contract. Those claims have been dismissed and are fully resolved in WSP's favor. The trial court overruled WSP's motion on Dr. Onady's claims for retaliation in violation of public policy and breach of contract. Those claims are not resolved and are the subject of the anticipated jury trial. *See Order Vacating Trial Dates,* April 4, 2018. WSP filed a timely appeal; Dr. Onady filed a timely cross-appeal.

{¶ 4} On this court's initial review, we questioned whether WSP could appeal the March 28 Decision. According to a Supplement to the Civil Docket Statement filed with the notice of appeal, WSP only sought review of the trial court's decision *overruling* its motion for summary judgment as to the unresolved claims for retaliation in violation of public policy claim and breach of contract. We ordered WSP to show cause why their appeal of *this portion* of the decision should not be dismissed because it was not final and appealable.

{¶ 5} WSP filed a response on April 23, 2018, and a supplemental response on April 26, 2018. Dr. Onady filed a reply on May 7, 2018. For the following reasons, we conclude that the denial of WSP's motion for summary judgment is not a final appealable order.

{¶ 6} It is axiomatic that 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).

{¶ 7} For a judgment to be final and appealable, it must satisfy the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Chef Italiano Corp. v. Kent State Univ*., 44 Ohio St.3d 86, 88, 541 N.E.2d 64 (1989). "Civ.R. 54(B) does not alter the requirement that an order must be final before it is appealable." *Cooper State Bank v. Columbus Graphics Comm.*, 10th Dist. Franklin No. 11AP-1069, 2012-Ohio-3337, ¶ 15, citing *Gen. Acc.* at 21.

{¶ 8} R.C. 2505.02 defines final appealable orders and provides in relevant part:

> 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:
>
> (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;
>
> (3) An order that vacates or sets aside a judgment or grants a new trial;
>
> (4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> > (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
> >
> > (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2505.02(B)(1) – (4).

{¶ 9} A decision *overruling* a motion for summary judgment is generally held not to be a final appealable order under R.C. 2505.02 because it does not resolve the matter:

> R.C. 2505.02(B)(1) provides that an order "that affects a substantial right in an action that in effect determines the action and prevents a judgment" is final and appealable. The portions of the trial court's order that *granted* summary judgment to several defendants on entire claims against them "determine[d] the action" as to those parties, and thus was a final order pursuant to R.C. 2505.02. Summary judgment precluded any recovery on those claims. Together with the appropriate "no just cause for delay" Civ. R. 54(B) language that the trial court added on June 3, 2005, those aspects of the order were final and appealable, *even though other portions of the order were not immediately appealable. See Celebrezze v. Netzley* (1990), 51 Ohio St.3d 89, 90, 554 N.E.2d 1292, certiorari denied (1990), 498 U.S. 967, 111 S.Ct. 428, 112 L.Ed.2d 412. Therefore, the May 9, 2005 order, with the later addition of the Civ.R. 54(B) language, is final and appealable, but only to the extent that it granted summary judgment on entire claims.

(Emphasis added.) *Interstate Properties v. Prasanna, Inc.*, 9th Dist. Summit No. 22734, 2006-Ohio-2686, ¶ 14. *See also Hubbell v. City of Xenia,* 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 9 ("Generally, the denial of summary judgment is not a final, appealable order").

{¶ 10} WSP acknowledges that the denial of a summary judgment motion is generally not final and appealable. Rather than directing us to a specific provision in the statute to

establish finality, WSP makes two main arguments: (1) that the issues involved in its appeal are purely legal issues, and may therefore be reviewed by this court; and (2) that the trial court intended for WSP to be able to appeal from the summary judgment decision. Neither argument is persuasive.

{¶ 11} We first observe that Ohio has not adopted a blanket rule allowing appeals whenever "purely legal issues" arise in a case. Section 3(B)(2), Article IV, of the Ohio Constitution states that courts of appeals "have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district." Such jurisdiction is "provided by law" in R.C. 2501.02 (among other places), which grants this court jurisdiction "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.) R.C. 2505.02, which is cited in relevant part above, defines those final orders. *In re N.A.M.*, 2d Dist. Montgomery No. 27723, 2018-Ohio-514, ¶ 3. We cannot create another category of reviewable interlocutory orders or read such a new category into the definitional statute. *See State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 124 Ohio St.3d 390, 2010-Ohio-169, 922 N.E.2d 945, ¶ 21 (court cannot read words into a statute); *State ex rel. McGinty v. Eighth Dist. Court of Appeals*, 142 Ohio St.3d 100, 2015-Ohio-937, 28 N.E.3d 88, ¶ 18 ("Interlocutory appeals are disfavored in Ohio law and are allowed only in circumstances described in R.C. 2505.02").

{¶ 12} WSP's argument that "purely legal issues" are reviewable is not without at least arguable support, however. WSP relies on the case of *Holdren v. Garrett*, 10th Dist. Franklin

No. 09AP-1153, 2011-Ohio-1095, in which appellant sought review of the trial court's "implicit denial of his motion for summary judgment." That court said:

> Denial of a motion for summary judgment is generally not a final appealable order. *Carter v. Complete Gen. Constr. Co.,* 10th Dist. No. 08AP-309, 2008-Ohio-6308, ¶ 8, citing *Celebrezze v. Netzley* (1990), 51 Ohio St.3d 89, 554 N.E.2d 1292. However, "an appellate court may review a denial of a motion seeking summary judgment on a pure question of law regardless of the movant's lack of success at trial." *Capella III, L.L.C. v. Wilcox,* 190 Ohio App.3d 133, 940 N.E.2d 1026, 2010-Ohio-4746, ¶ 14.

Holdren, at ¶ 12. The context of this statement is important, as is its support.

{¶ 13} *Holdren*, like *Capella III* and several of the cases cited by WSP, was an appeal taken *after* trial and/or judgment in the case. None of the cases were in the posture of the case before us, where an interlocutory appeal was filed before full resolution of the matter. And, while the court in *Holdren* found that the order purporting to be final was not (for unrelated reasons), it was entered after all the claims had been tried to a magistrate and the magistrate's decision reviewed by the trial court. These cases are distinguishable in their procedural posture.

{¶ 14} *Holdren* analyzes the final appealable order issue in this way:

> *Capella III* involved a claim that the trial court erred in denying a motion for summary judgment. This court noted that despite the general rule that denial of summary judgment is not a final appealable order, "error in the denial of a summary-judgment motion that presents a purely legal question is not rendered harmless by a subsequent trial on the merits." *Capella III* at ¶ 14,

> citing *Continental Ins. Co. v. Whittington* (1994), 71 Ohio St.3d 150, 158, 642 N.E.2d 615. In that case, as in the present appeal, the motion for summary judgment was based on a legal issue and did not depend on disputed issues of material fact. Therefore, the court proceeded to consider the argument that the trial court should have granted summary judgment.

(Emphasis added.) *Holdren* at ¶ 13.

{¶ 15} Neither *Capella III* nor *Whittington* makes that pivotal statement, however. Paragraph 13 of *Capella III* states in relevant part: "Ordinarily, 'the denial of a motion for summary judgment is not a *point of consideration* in an appeal from a final judgment entered following a trial on the merits.' " (Emphasis added.) *Capella III* at ¶ 13, quoting *Whittington* at 156. In both those cases, the courts were grappling with the question of whether the denial of a motion for summary judgment could be reviewed after a final judgment had been entered in the case. The issue was not finality, but whether the decision was reviewable – not in its interlocutory form, which the Supreme Court in *Whittington* agreed was not final – but at all, given that trial on the merits had produced a final judgment. *Capella III* at ¶ 14 ("error in the denial of a summary-judgment motion that presents a purely legal question is not rendered harmless by a subsequent trial on the merits"); *Whittington* at 157 (agreeing that a party "could not immediately appeal from the orders denying its motions [for summary judgment] because the orders were not final and appealable" at the time). Whether an issue is reviewable on appeal after final judgment, i.e., is not harmless error or moot given the result at trial, is a distinct issue from whether an interlocutory order is final and appealable

and subject to review *before* trial.[1] The cases relied upon by WSP generally address the former issue, while we are faced with the latter. *Holdren* in particular stretches the rationale of *Capella III* and *Whittington* too far, and we decline to follow it. We are likewise unconvinced that the procedurally distinct cases cited by WSP justify a departure from the general rule that the denial of a motion for summary judgment is not a final appealable order.

{¶ 16} WSP's second argument concerns the trial court's intent in certifying that there is no just reason for delay. *See* Civ.R. 54(B) ("When more than one claim for relief is presented * * *, 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"). WSP asserts that "the trial court judge informed the parties * * * that it was his express intention for his Decision to constitute a final appealable order, that that the [Civ.R.] 54(B) language contained therein applies to **both** parties." (Emphasis in original.) WSP provided a transcript of a telephone conference in which the matter was discussed with the trial court.

{¶ 17} We conclude that the trial court's intent is not dispositive here, for two reasons: first, because a trial court is not empowered to determine whether orders are final and appealable, and second, because Civ.R. 54(B) does not apply as a matter of law to non-final orders.

{¶ 18} The Supreme Court of Ohio has held that " '[t]he determination as to the appropriateness of an appeal lies solely with the appellate court.' " *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 129 Ohio St.3d 30,

[1] At this time, we make no determination whether the summary judgment denial presents purely legal issues.

2011-Ohio-626, 950 N.E.2d 149, ¶ 16, quoting *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207, ¶ 10-11; *see also In re Terrance P.*, 124 Ohio App.3d 487, 489, 706 N.E.2d 801 (1997) ("the trial court does not have any jurisdiction to consider whether the person has validly invoked the jurisdiction of the appellate court"). Indeed, the trial court here expressly recognized this fact, referring to these cases during the telephone conference with the parties. While the trial court has discretion to determine whether to append a Civ.R. 54(B) certification to its partial final judgment and can effectuate appealability in that way, the appellate court is tasked with determining the legal issue of whether the trial court's orders are final and appealable.

{¶ 19} More importantly, however, is the fact that Civ.R. 54(B) language has no effect on a non-final order, regardless of the trial court's intent. The rule states that "the [trial] court may enter final judgment as to one or more but fewer than all of the claims" pending in the case by using the required language. That "final judgment" must be final as defined in R.C. 2505.02. *See Noble v. Colwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989), citing *Gen. Elec. Supply Co. v. Warden Elec., Inc.*, 38 Ohio St.3d 378, 528 N.E.2d 195 (1988), syllabus. ("The order at issue must always fit into at least one of the * * * categories of final order set forth in R.C. 2505.02"). Thus, if the order on appeal is not a final order pursuant to R.C. 2505.02, it cannot be turned into one by application of Civ.R. 54(B) language. *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 89, 541 N.E.2d 64 (1989).

Here, there is no argument that the trial court's decision overruling WSP's motion for summary judgment on two of Dr. Onady's claims against it was a final appealable order under any relevant provision of R.C. 2505.02, and the general rule holds otherwise. *Celebrezze v. Netzley*, 51 Ohio St.3d 89, 90, 554 N.E.2d 1292 (1990). It is therefore not a

final order that can be made appealable by the addition of Civ.R. 54(B) language. *See Whipps v. Ryan*, 10th Dist. Franklin No. 07AP-231, 2008-Ohio-1216, ¶ 21, quoting *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 354, 617 N.E.2d 1136 (1993) ("This phrase 'is not a mystical incantation which transforms a nonfinal order into a final appealable order. Such language can, however, through Civ.R. 54(B), transform a final order into a final appealable order' ").

{¶ 20} We are not convinced that the March 28 Decision denying summary judgment is reviewable at this time because it presents purely legal issues, or because the trial court intended it to be final. Accordingly, we find our Show Cause Order NOT SATISFIED. WSP's appeal from the denial of its motion for summary judgment is DISMISSED. Dr. Onady's cross-appeal shall continue.

{¶ 21} For convenience, we REDESIGNATE Dr. Onady as appellant and WSP as appellee. The briefing schedule shall commence using those redesignations. Appellant's brief is due 20 days after the journalization of this Decision and Entry.

SO ORDERED.

JEFFREY M. WELBAUM, Presiding Judge

MARY E. DONOVAN, Judge

JEFFREY E. FROELICH, Judge

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