

[Cite as *Truitt v. Hamm*, 2010-Ohio-3367.]

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

SARI JANE TRUITT, :  
ADMINISTRATOR, OF THE ESTATE :  
OF KERMIT G. PHILLIPS, :

Plaintiff-Appellant, : CASE NO. 09CA3310

vs. :

LULA MAE HAMM, : DECISION AND JUDGMENT ENTRY

Defendant-Appellee. :

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APPEARANCES:

COUNSEL FOR APPELLANT: John R. Stevenson, 116 Poole Street, West  
Portsmouth, Ohio 45663

COUNSEL FOR APPELLEE: David B. Beck, 800 Gallia Street, Suite 800,  
Portsmouth, Ohio 45662

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CIVIL APPEAL CASE FROM COMMON PLEAS COURT  
DATE JOURNALIZED: 5-24-10

ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court summary judgment in favor of Lula Mae Hamm, defendant below and appellee herein. The trial court determined that no genuine issues of material fact remained as to whether Kermit G. Phillips<sup>1</sup> validly transferred a parcel of real estate to appellee and, thus, dismissed

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<sup>1</sup> Mr. Phillips died during the trial court proceedings. Sari Jane Truitt, the administrator of his estate, was substituted in his place.

his unjust enrichment claim based upon his alleged invalid transfer of real estate.

{¶ 2} Sari Jane Truitt, the Administrator of the Estate of Kermit G. Phillips, plaintiff below and appellant herein, raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT/APPELLEE BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT.”

SECOND ASSIGNMENT OF ERROR:

“EVEN IF APPELLEE WAS ENTITLED TO SUMMARY JUDGMENT ON SOME ISSUES PLAINTIFF-APPELLANT’S CLAIM FOR UNJUST ENRICHMENT HAS NOT BEEN DECIDED.”

{¶ 3} On July 8, 2008, Mr. Phillips filed a complaint and claimed that he conveyed real estate to appellee “for no consideration.” He further alleged that appellee failed to pay taxes or insurance and failed to perform maintenance or upkeep on the property. Mr. Phillips averred that appellee refused to return the real estate and, as a result, she has been unjustly enriched. Mr. Phillips further claimed that appellee refused to return his dog. He requested the trial court to enter an order conveying to him appellee’s interest in the property and requiring appellee to return the dog.

{¶ 4} Appellee denied liability and filed a counterclaim. Her counterclaim alleged that appellant committed waste on the property. She further alleged that she is the true owner of the dog.

{¶ 5} On July 27, 2009, the trial court entered summary judgment in appellee’s favor. The court determined that no genuine issues of material fact remained

regarding whether Mr. Phillips validly transferred the real estate and, thus, entered judgment in appellee's favor regarding appellant's real estate/unjust enrichment claim. The court found, however, that a genuine issue of material fact remained regarding the ownership of the dog. On August 12, 2009, the parties agreed to dismiss, without prejudice, all claims and counterclaims that involved the dog.

{¶ 6} Although this court previously agreed with appellant concerning jurisdiction to consider this appeal, our further review of the record reveals that we do not.<sup>2</sup> Appellate courts have jurisdiction to review the final orders of inferior courts within their districts. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2501.02. If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and it must be dismissed. See General Acc. Ins. Co. v. Ins. Co. of N. America (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266. In the event that the parties involved in the appeal do not raise this jurisdictional issue, an appellate court must sua sponte raise it. See Chef Italiano Corp. v. Kent State Univ. (1989), 44 Ohio St.3d 86, 541 N.E.2d 64, syllabus; Whitaker-Merrell v. Geupel Co. (1972), 29 Ohio St.2d 184, 186, 280 N.E.2d 922.

{¶ 7} “An order is a final order that may be reviewed, affirmed, modified, or

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<sup>2</sup> On August 26, 2009, appellant filed a notice of appeal. On September 9, 2009, this Court directed appellant to file a memorandum to address our jurisdiction. Appellant argued that we had jurisdiction to consider the appeal because even though the case involved multiple claims and the trial court did not use Civ.R. 54(B) language, the parties later dismissed the remaining claims and counterclaims. On October 8, 2009, the magistrate agreed with appellant concerning jurisdiction. However, as we point out *infra*, additional information unrelated to the claims that involve the dog renders that view incorrect.

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” or “[a]n order that affects a substantial right made in a special proceeding[.]” R.C. 2505.02(B)(1) & (2). “A final order \* \* \* is one disposing of the whole case or some separate and distinct branch thereof.” Lantsberry v. Tilley Lamp Co. (1971), 27 Ohio St.2d 303, 306.

{¶ 8} When a court issues a judgment that disposes of some claims but leaves other claims pending, the order is final and appealable only if the judgment complies with Civ.R. 54(B). That rule states:

“When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, 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 a determination that there is no just reason for delay, 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.”

Civ.R. 54(B) allows a trial court to enter final judgment as to one or more, but fewer than all, claims in a multi-claim action only upon an express determination of “no just reason for delay.” Without this language, a reviewing court does not have jurisdiction and the appeal must be dismissed. Prod. Credit Assn. v. Hedges (1993), 87 Ohio App.3d 207, 210, 621 N.E.2d 1360 at fn. 2; Kouns v. Pemberton (1992), 84 Ohio App.3d 499, 501, 617 N.E.2d 701.

{¶ 9} The case at bar involves multiple claims. Appellant’s complaint asserted two causes of action: one for unjust enrichment and one for the return of a dog.

Appellee also filed a counterclaim (1) that alleged appellant committed waste upon the property, and (2) requested that she be designated the legal owner of the dog. The trial court entered summary judgment on one of these claims (the unjust enrichment claim), but did not include “no just reason for delay” language. Rather, the court found genuine issues of material fact remained regarding ownership of the dog, that claim remained pending until its dismissal. Assuming for purposes of argument that the parties’ dismissal of the claim regarding the dog could render the trial court’s summary judgment decision a final, appealable order,<sup>3</sup> we recognize that (1) appellee’s claim for waste upon the property remains pending; and (2) the parties’ agreed dismissal entry makes no mention of this claim.

{¶ 10} Consequently, because a claim remains pending, we lack a final, appealable order to review and we must dismiss the instant appeal.

APPEAL DISMISSED.

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<sup>3</sup> In Pattison v. W.W. Grainger, Inc., 120 Ohio St.3d 142, 2008-Ohio-5276, 897 N.E.2d 126, the Ohio Supreme Court held that a party may not create a final, appealable order by voluntarily dismissing a claim. The court stated: “[W]hen a plaintiff has asserted multiple claims against one defendant, and some of those claims have been ruled upon but not converted into a final order through Civ.R. 54(B), the plaintiff may not create a final order by voluntarily dismissing pursuant to Civ.R. 41(A) the remaining claims against the same defendant.” *Id.* at ¶1.

JUDGMENT ENTRY

It is ordered that the appeal be dismissed and that appellee recover of appellant 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 Scioto 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.

Harsha, J. & Kline, J.: Concur in Judgment & Opinion

For the Court

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.