

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Melissa M. Moore, :
 :
 Plaintiff-Appellant, :
 :
 v. : No. 09AP-1077
 : (C.P.C. No. 08 CV 15453)
 Jason M. Gross et al., : (REGULAR CALENDAR)
 :
 Defendants-Appellees. :

D E C I S I O N

Rendered on July 15, 2010

Strip, Hoppers, Leithart, McGrath & Terlecky Co., L.P.A., Joel R. Campbell and Kristie A. Campbell, for appellant.

Mazanec, Raskin, Ryder & Keller Co., L.P.A., John T. McLandrich and Frank H. Scialdone, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH J.

{¶1} Plaintiff-appellant, Melissa M. Moore ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas granting the motion of defendants-appellees, Officer Jason M. Gross ("Officer Gross"), the Minerva Park Police Department and the Village of Minerva Park (collectively "Minerva Park"), for judgment on the pleadings.

{¶2} On August 3, 2008, Boback Pourfarhadi ("Pourfarhadi") was struck by a Minerva Park Police cruiser driven by Officer Gross. Appellant alleges that she was walking near Pourfarhadi, her fiancé, at the time of the accident. While Pourfarhadi was killed, appellant suffered no physical injuries; however, she alleges that, as a direct result of Officer Gross's and Minerva Park's actions, she suffered emotional distress and that her emotional injuries caused her to incur ongoing medical expenses.

{¶3} On October 28, 2008, appellant filed her complaint stating five causes of action. The first was a claim for relief for serious infliction of emotional distress against Officer Gross, a cause of action that appellant later voluntarily dismissed. The second was a claim for relief for negligent conduct against Officer Gross and Minerva Park. The third was a claim for relief for reckless conduct against Officer Gross and Minerva Park. The fourth was a claim for relief for loss of companionship and support against Officer Gross and Minerva Park, a claim that was later dismissed. Lastly, the fifth was a claim for relief for vicarious liability against Minerva Park. Appellant proceeded on her second, third, and fifth causes of action.

{¶4} Shortly before Moore filed her complaint, Aaron Porterfield, as administrator for the Estate of Pourfarhadi, filed a complaint against the same defendants for wrongful death. The cases were consolidated.

{¶5} Officer Gross and Minerva Park filed a motion for judgment on the pleadings pursuant to Civ.R. 12(C), which states: "[a]fter the pleadings are closed but within such times as not to delay the trial, any party may move for judgment on the pleadings." Review of motions for judgment on the pleadings is limited to the statements contained within the pleadings and must be liberally construed and in a manner most

favorable to the nonmoving party. *Burnside v. Leimbach* (1991), 71 Ohio App.3d 399. Motions for judgment on the pleadings only present questions of law and cannot be granted unless no factual issues exist. *Id.* The trial court granted Officer Gross's and Minerva Park's motion for judgment on the pleadings stating that appellant "does not have standing to assert claims of negligence, reckless conduct and vicarious liability as she does not allege that she suffered any physical injuries from the actions of [Officer Gross and Minerva Park]." (Oct. 19, 2009 decision and entry at 5.) Appellant alleged only emotional injuries, for which the single avenue for her to recover would have been under a cause of action for negligent infliction of emotional distress, a cause of action that appellant previously voluntarily dismissed.

{¶6} On appeal, appellant asserts the following two assignments of error:

[1.] THE TRIAL COURT ERRED IN ITS ANALYSIS OF A MOTION FOR JUDGMENT ON THE PLEADINGS THAT PLAINTIFF-APPELLANT MAY ONLY RECOVER IN AN ACTION FOR NEGLIGENCE CLAIM ARISING FROM NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS BY DEMONSTRATING A CONTEMPORANEOUS PHYSICAL INJURY WHEN PLAINTIFF-APPELLANT WAS A BY-STANDER TO A MOTOR VEHICLE ACCIDENT CAUSING DEATH TO HER FIANCÉ.

[2.] THE TRIAL COURT ERRED IN ITS DETERMINATION OF A MOTION FOR JUDGMENT ON THE PLEADINGS THAT PLAINTIFF-APPELLANT'S CASE LACKED STANDING TO PURSUE CAUSES OF ACTION FOR NEGLIGENCE, RECKLESS CONDUCT AND VICARIOUS LIABILITY.

{¶7} We do not reach the merits of these assignments of error, however, because we lack jurisdiction to do so.

{¶8} Section 3(B)(2), Article IV of the Ohio Constitution, limits this court's appellate jurisdiction to the review of final orders of lower courts. The Ohio Supreme Court has stated that 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. An appellate court may raise, sua sponte, the jurisdictional question of whether an order is final and appealable. See *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 87; *State ex rel. White v. Cuyahoga Metro. Hous. Auth.* (1997), 79 Ohio St.3d 543, 544. Moreover, we must sua sponte dismiss an appeal that is not from a final appealable order. See *Whitaker-Merrell Co. v. Geupel Constr. Co.* (1972), 29 Ohio St.2d 184, 186 (holding that the appeals court should have sua sponte dismissed the appeal where the entry granting summary judgment to fewer than all the parties did not include Civ.R. 54(B) language).

{¶9} A trial court's order is final and appealable only if it meets the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Denham v. New Carlisle* (1999), 86 Ohio St.3d 594, 596, citing *Chef Italiano Corp.* at 88. In *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96, the Ohio Supreme Court held that, to constitute a final order, an order must fit into at least one of the categories set forth in R.C. 2505.02(B), which defines a final order, in pertinent part, as any 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[.]

{¶10} " 'Substantial right' means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1).

{¶11} As the Ohio Supreme Court noted in *Denham* at 595, courts must read R.C. 2505.02 in conjunction with Civ.R. 54(B). Civ.R. 54(B) applies to situations where there is more than one claim for relief presented or there are multiple parties involved in an action, and where the trial court has rendered judgment with respect to fewer than all the claims or fewer than all the parties. Civ.R. 54(B) provides:

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 of the parties.

{¶12} In the absence of express Civ.R. 54(B) language, an appellate court may not review an order disposing of fewer than all claims. *Whitaker v. Kear* (1996), 113 Ohio App.3d 611, citing *Mezerkor v. Mezerkor* (1994), 70 Ohio St.3d 304.

{¶13} We need not consider whether the entry before us is a final order under R.C. 2505.02 because the entry does not contain a certification by the trial court that there is no just reason for delay as required by Civ.R. 54(B), a point essentially conceded

by appellant in her response to Officer Gross's and Minerva Park's motion to dismiss. (Appellant's memorandum contra at 4.)

{¶14} In the case at hand, all claims of all the parties have not yet been adjudicated as the claims of the Estate of Pourfarhardi remain unresolved. Because claims remain pending and there is no express Civ.R. 54(B) language, we lack jurisdiction to adjudicate appellant's assigned errors.

{¶15} Accordingly, we sua sponte dismiss this appeal. Since we have dismissed this appeal, appellant's motion to dismiss appellees' cross-appeal is therefore moot.

*Appeal sua sponte dismissed;
motion to dismiss cross-appeal moot.*

KLATT and CONNOR, JJ., concur.
