[Cite as *Myers v. State Farm Ins.*, 2003-Ohio-174.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81162

JOANN MYERS Plaintiff-appellant vs. STATE FARM INSURANCE, et al. Defendant-appellee	:	JOURNAL ENTRY and OPINION
DATE OF ANNOUNCEMENT OF DECISION	:	JANUARY 16, 2003
CHARACTER OF PROCEEDING	:	Civil appeal from Cuyahoga County Court of Common Pleas Case No. CV-405376
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

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KENNETH A. ROCCO, P.J.:

{¶1} Plaintiff-appellant Joann Myers appeals from common pleas court orders granting summary judgment in favor of defendant-appellee Nationwide Insurance Company and denying Myers' cross-motion for summary judgment against Nationwide. After these orders were entered, the common pleas court dismissed all claims against all parties. The final dismissal order rendered the interlocutory order granting summary judgment to Nationwide a nullity. Orders entered by the court following the dismissal order were also void, because the court had no jurisdiction to enter them.

{¶2} Appellant's arguments do not challenge the court's dismissal of this case. Therefore, we affirm.

Procedural History

{¶3} Appellant originally filed this action on March 31, 2000. Her second amended complaint, filed December 4, 2001, alleged claims against defendants State Farm Insurance Company, Mitchell Johnson, John/Jane Doe, Delores Acesta, and Nationwide Insurance Company. The complaint alleged that appellant was a passenger on a motorcycle operated by defendant Mitchell, an uninsured/underinsured driver. Appellant and Mitchell were involved in an accident with an uninsured/underinsured automobile owned by defendant Acesta and driven by an uninsured/underinsured

driver identified only as John/Jane Doe. Appellant claimed that the negligence of the driver of the motorcycle, the driver of the car and the owner of the car caused her injuries, and therefore they were each liable to her. She also claimed that State Farm, her own automobile insurance carrier, breached its contract by refusing to pay her uninsured motorist/underinsured motorist ("UM/UIM") benefits. Finally, she claimed that she was an insured under a business owner's policy and business auto insurance policy issued to her employer by Nationwide, and that Nationwide breached its duty to pay her UM/UIM benefits under those policies.

{¶4} Appellant and Nationwide both moved for summary judgment against one another. On January 31, 2002, Nationwide's motion was granted and appellant's motion was overruled. The court expressly stated that the judgment for Nationwide was partial, not final.

{¶5} On March 19, 2002, the court entered default judgment in plaintiff's favor against Acesta, the owner of the automobile. On that same date, the court entered a stipulated order dismissing the claims against State Farm, with prejudice, pursuant to a settlement agreement among the parties. Finally, and most critical to our disposition of this case, is the following order, also entered on March 19, 2002:

{¶6} "Case is dismissed as to all parties. Case is now dismissed as to all parties with prejudice. Final."

{¶7} A week later, on March 26, 2002, the following entry was filed:

{¶8} "Case is dismissed. More definitive entry to follow. Final. Case is to be removed from active docket of Judge Calabrese Jr."

{¶9} Finally, on April 8, 2002, the court entered the following order:

{¶10} "Docket entry to provide additional clarification to previously granted MSJ. Motion for summary judgment of deft. Nationwide (filed 9-20-02) was previously granted. Partial. The court having considered all the evidence and having construed the evidence most strongly in favor of the non-moving party determines that reasonable minds can come to but one conclusion, that there are no genuine issues of material fact, and that deft Nationwide is entitled to judgment as a matter of law."

Law and Analysis

{¶11} Appellant's two assignments of error challenge the common pleas court's orders granting summary judgment for Nationwide and overruling appellant's motion for summary judgment. These orders adjudicated the rights and liabilities of fewer than all the parties. The court did not determine that there was no just reason for delay in entering final judgment for Nationwide, so the orders were "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).

{¶12} In fact, the court here did revise the judgment when it dismissed the "case" "as to all parties" with prejudice. The

only reasonable construction of this language is that the court dismissed all claims against all parties, including those parties as to whom interlocutory judgments had been entered. For this reason, this case is not analogous to *Denham v. New Carlisle* (1999), 86 Ohio St.3d 594. In *Denham*, the court granted summary judgment for one defendant, after which the plaintiff dismissed her claims against the *remaining* parties, without prejudice. The Supreme Court in *Denham* found that a plaintiff could voluntarily dismiss all claims against some defendants, leaving standing a prior order granting summary judgment for another defendant, which became a final appealable order once the court disposed of all claims against all parties. Here, by contrast, the court dismissed the "case" "with prejudice" "as to all parties." Thus, the partial summary judgment was replaced by the order of dismissal, which became the final order of the court.

{¶13} A dismissal with prejudice is, obviously, a final judgment on the merits. See, e.g., *Briggs v. Cincinnati Recreation Commn. Office Mike Thomas* [sic] (1998), 132 Ohio App.3d 610, 611. Once this final judgment was entered, the court had no jurisdiction to reconsider or vacate it on its own motion. *Pitts v. Ohio Dept. Of Transp.* (1981), 67 Ohio St.2d 378, paragraph one of the syllabus; *In re Szymczak* (July 23, 1998), Cuyahoga App. No. 73097. Although the court had the power to correct the entry, nunc pro tunc, to reflect the action actually taken by the court, it could

not substantively change a final judgment, as it attempted to do here.[1] See, e.g., *State v. Coleman* (1959), 110 Ohio App. 475. Therefore, the orders following the entry of final judgment are a nullity.[2]

{¶14} "It has long been the policy of Ohio courts that judgments must be accorded finality, even if those judgments are not perfect - 'for obvious reasons, courts have typically placed finality above perfection in the hierarchy of values.'" *In re Szymczak* (July 23, 1998), Cuyahoga App. No. 73097 (quoting *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 175). That said, however, perfection may still be attainable. A motion for relief from judgment pursuant to Civ.R. 60(B) may be an appropriate means to resolve this matter.

{¶15} We hold that the court's order of dismissal superseded the partial summary judgment, and rendered appellant's assignments of error moot. Appellant does not challenge the order of dismissal. Therefore, her assignments of error are overruled. We affirm.

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[1]The post judgment order did not attempt to correct the final order of dismissal. Rather, the court attempted to reenter the summary judgment in favor of Nationwide after dismissal of the entire case.

[2]Appellant apparently recognized this fact when she noted in her notice of appeal that the original dismissal entry dated March 19, 2002, was the final judgment from which she was appealing.

{¶16} It is ordered that appellee recover of appellant its costs herein taxed.

{¶17} The court finds there were reasonable grounds for this appeal.

{¶18} It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

{¶19} A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PRESIDING JUDGE
KENNETH A. ROCCO

ANN DYKE, J. CONCURS

DIANE KARPINSKI, J. DISSENTS WITH SEPARATE DISSENTING OPINION

KARPINSKI, J., DISSENTING:

{¶20} Respectfully, I dissent. I disagree with the majority when it concludes the "common pleas court dismissed all claims against all parties. The final dismissal order rendered the interlocutory order granting summary judgment to Nationwide a nullity." As explained in this court's decision in *Saikus v. Ford Motor Co.* (Apr. 12, 2001), Cuyahoga App. No. 77802, there is jurisdiction over this appeal.

{¶21} In *Saikus*, supra, plaintiff filed a complaint for personal injury against Ford Motor Co. and two other defendants, T.E. Clarke Ford, Inc., and Craig Bohl. During the proceedings, the trial court disposed of all of plaintiff's claims against Clarke Ford when the court granted Clarke Ford summary judgment. Plaintiff's claims against the other two defendants remained pending until a settlement was reached later in the case. On appeal, plaintiff argued the court erred in granting Ford summary judgment. Before reaching the merits of the appeal, the majority in *Saikus* sua sponte raised the issue of the jurisdictional propriety of the appeal and explained as follows:

{¶22} "On March 7, 2000, the court entered an order which stated 'settled and dismissed with prejudice. Final.' Thereafter, the court entered an order nunc pro tunc as and for March 7, 2000, which provided that 'all remaining claims against Defendants TE Clarke Ford and Bohl only have been settled and dismissed with prejudice. Costs to defendant TE Clarke Ford. Final.'

{¶23} ***

{¶24} "The trial court's grant of the defendants' summary judgment motions disposed of all the claims against Ford in the amended complaint but only partially disposed of the claims against Clarke Ford and Bohl. The summary judgment was not final and appealable at that time because the court had not certified that there was no just cause for delay pursuant to Civ.R. 54(B).

Accordingly, the order granting summary judgment was interlocutory and subject to amendment at any time.

{¶25} "The court's nunc pro tunc dismissal order disposed of the specified ("remaining") claims against specific parties (Clarke Ford and Bohl). As these were the only claims still pending in the case, their disposition resolved all claims against all parties and made the prior order granting summary judgment to Ford final and appealable.

{¶26} "Therefore, we find we have jurisdiction over this appeal."

{¶27} In the case at bar, plaintiff filed her complaint against Nationwide, State Farm, and two individual defendants.[3] Before plaintiff resolved her claims against State Farm and the other defendants, the trial court granted summary judgment to Nationwide, thus disposing of all of plaintiff's claims against Nationwide. Plaintiff went on to resolve the rest of her claims against the remaining defendants. Part of the trial court's docket reflects the following entries:

{¶28} "1/31/2002 MTN FOR S.J. OF DEFT. NATIONWIDE (FILED 9/20/01) IS GRANTED. SECOND MTN FOR S.J. OF DEFT NATIONWIDE (FILED 12-31-01) IS GRANTED. Partial. ***.

{¶29} "***

[3]Plaintiff named a third defendant identified only as John/Jane Doe.

{¶30} "3/19/2002 MOTION OF JOANN MYERS FOR DEFAULT JUDGMENT IS GRANTED AGAINST DELORES ACESTA ***.

{¶31} "3/19/2002 STIPULATION OF DISMISSAL (FILED 3/18/02). PARTIAL AS TO DEFT STATE FARM ONLY. WE *** DO HEREBY STIPULATE THAT ALL CLAIMS *** AGAINST STATE FARM HEREIN ARE HEREBY SETTLED, PURSUANT TO A SETTLEMENT AGREEMENT, AND THAT THE CLAIMS AGAINST THE DEFT STATE FARM ARE DISMISSED, WITH PREJUDICE. ANY OTHER CLAIMS REMAIN UNAFFECTED BY THIS ENTRY. ***

{¶32} "3/19/2002 CASE IS DISMISSED AS TO ALL PARTIES. CASE IS NOW DISMISSED AS TO ALL PARTIES WITH PREJUDICE...FINAL: *** COURT COST ASSESSED TO THE PLAINTIFF(S).

{¶33} "***

{¶34} "03/26/2002 CASE IS DISMISSED. MORE DEFINITIVE ENTRY TO FOLLOW. FINAL. CASE IS TO BE REMOVED FROM ACTIVE DOCKET TO JUDGE CALABRESE JR *** FINAL: ***.

{¶35} "04/08/2002 DOCKET ENTRY TO PROVIDE ADDITIONAL CLARIFICATION TO PREVIOUSLY GRANTED MSJ. MOTION FOR SUMMARY JUDGMENT OF DEFT, NATIONWIDE (FILED 9/20/02) WAS PREVIOUSLY GRANTED. PARTIAL. THE COURT HAVING CONSIDERED ALL THE EVIDENCE AND HAVING CONSTRUED THE EVIDENCE MOST STRONGLY IN FAVOR OF THE NON-MOVING PARTY DETERMINES THAT REASONABLE MINDS CAN COME TO BUT ONE CONCLUSION, THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT, AND THAT DEFT NATIONWIDE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW."[4]

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[4]**{¶a}** There is another entry on 4/10/2002, which, in part, reiterates the 4-8-02 entry regarding the grant of summary judgment

{¶36} I see no practical or procedural difference between the facts in this case and those in *Saikus*. Just as in *Saikus*, when the trial court in the case at bar granted Nationwide's summary judgment motions on February 1, 2002, it disposed of all plaintiff's claims against Nationwide and left her claims against State Farm and the other defendants pending. At that point, the summary judgment was interlocutory and subject to clarification at any time. I agree with the majority that the orders granting and denying summary judgment were "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." I disagree, however, that "revision" is what occurred.

{¶37} After the court granted Nationwide's motion for summary judgment, Nationwide was a passive party, extrinsic to the case, the claim against it having been resolved. It would not, for example, have been expected to attend pre-trials or even the trial

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to Nationwide. That entry reads:

{¶b} "04/10/2002 DOCKET ENTRY TO PROVIDE ADDITIONAL CLARIFICATION TO PREVIOUSLY GRANTED MSJ AND PLTFS CROSS MOTION FOR SUMMARY JUDGMENT. PLTFS CROSS MOTION FOR SUMMARY JUDGMENT (FILED 11/26/02) WAS PREVIOUSLY DENIED. MOTION FOR SUMMARY JUDGMENT OF DEFT. NATIONWIDE (FILED 9/20/02) WAS PREVIOUSLY GRANTED. PARTIAL. THE COURT HAVING CONSIDERED ALL THE EVIDENCE AND HAVING CONSTRUED THE EVIDENCE MOST STRONGLY IN FAVOR OF THE NON-MOVING PARTY DETERMINES THAT REASONABLE MINDS CAN COME TO BUT ONE CONCLUSION, THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT, AND THAT DEFT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW."

itself. The court's March 19, 2002 order, therefore, disposed of the claims against State Farm and Acesta, because these were the only claims still pending in the case. Their disposition resolved all claims against all parties and made the prior order granting summary judgment to Nationwide final and appealable.

{¶38} On March 20, 2002, the trial court dismissed the case, as to all parties, with prejudice. Later, on April 8th and April 10th, the trial court entered two orders in which, among other things, it clarified the grant of summary judgment to Nationwide. I fail to see any material difference between this sequence of events and the dismissal with prejudice in *Saikus*, supra, finding appellate jurisdiction when plaintiff appealed the grant of summary judgment to Ford.

{¶39} In *Saikus* the trial court initially granted summary judgment to one defendant and then later wrote an order dismissing all claims as settled. This second order appeared to include the defendant who had been granted summary judgment. The court subsequently clarified that only the remaining claims had been settled, and this court of appeals accepted this clarifying order and held it had jurisdiction.

{¶40} As in *Saikus*, this court also has jurisdiction over this appeal because the April 8th order is nothing more than a reiteration of what had occurred earlier, namely, the grant of summary judgment to Nationwide. The majority denies that the court

had the authority to enter the April 8th order as a nunc pro tunc entry clarifying its decision.

{¶41} Without any basis in the record, the majority concludes that the April 8th entry is a substantive change to the court's final judgment. [5]The majority states: "The post judgment order did not attempt to correct the final order of dismissal. Rather, *the court attempted to reenter* the summary judgment in favor of Nationwide after dismissal of the entire case." (Ante, p. 6; emphasis added).

{¶42} I disagree with the majority's conclusion that the court's April 8th entry reaffirming its earlier grant of summary judgment to Nationwide does not qualify as a nunc pro tunc entry. First, that entry cannot be a substantive change because the court had already granted summary judgment to Nationwide. The court never expressly contradicted that earlier order. On its face, the April 8th entry merely clarifies the fact that summary judgment was granted by adding verbatim language from Civ.R. 56. There is nothing in the entry which changed the fact that the order granting summary judgment to Nationwide was now made final and appealable because the claims unaffected by the summary judgment order were now dismissed with prejudice.

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[5]Initially, I note that none of the parties has characterized the final judgment as an improper change of the court's prior decision.

{¶43} Additionally, I am compelled to comment on the majority's analysis of an interlocutory order. In the case at bar, the grant of summary judgment to Nationwide was a definite grant of relief, albeit in an interlocutory order. When the court finally dismissed the case with prejudice as to those other parties, Nationwide's summary judgment then became final and thus ripe for appeal.

{¶44} The majority relies upon *Pitts v. Ohio Dept. Of Transp.* (1981), 67 Ohio St. 2d 378, paragraph one of the syllabus, for the proposition that the trial court could not reconsider or vacate a dismissal with prejudice on its own motion. *Pitts*, however, is completely inapposite to the case at bar. First, because *Pitts* was an administrative appeal, the trial court functioned as an appeals court. That is not the situation before this court. Second, *Pitts* dealt exclusively with a motion to reconsider, which no one filed in this case. Thus *Pitts* is inapplicable.

{¶45} I disagree with the majority's statement that because the trial court had dismissed the case with prejudice the court could not write a nunc pro tunc order reaffirming the decision to grant summary judgment. It is settled law that a trial court may clarify its own previous order so long as the "corrected entry does not create or deny existing rights." Civ.R. 60(A); *Iglodi v. Montz* (June 9, 1994), 8th Dist. No. 64941; *Torres v. Sears*

Roebuck & Co. (1980), 68 Ohio App.2d 87, 427 N.E.2d 32; *State ex rel. Rogers v. Rankin* (1950), 154 Ohio St. 23, 93 N.WE.2d 281; *National Life Ins. Co. v. Kohn* (1937), 133 Ohio St. 111, 11 N.E.2d 1020.

{¶46} In this case, the trial court did not revise its earlier entry granting Nationwide summary judgment; that decision was clear from the beginning. The court merely clarified a very broad entry that never even mentioned Nationwide. The April 8 and 10, 2002 entries do not create or deny any existing rights. The majority provides no authority for ignoring the clarifying orders of April 8 and 10, 2002. In that order, the trial court did not "revise" or "replace" its prior summary judgment. The court merely reaffirmed what it had said originally in its entry of January 31, 2002 granting Nationwide summary judgment.

{¶47} It would be a misreading of this docket to see the clarifications of April 8 and 10, 2002 as something new. The trial court had previously determined Nationwide was entitled to summary judgment because neither the Browns' general business policy nor the auto policy provide any UM coverage to plaintiff. This court has jurisdiction to review that judgment. It would not serve judicial economy to clarify again what has already been explained.