[Cite as *Scheel v. Rock Ohio Caesars Cleveland, L.L.C.*, 2017-Ohio-7174.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 105037**

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## SCOTT SCHEEL

PLAINTIFF-APPELLANT

vs.

## ROCK OHIO CAESARS CLEVELAND, L.L.C. D.B.A. HORSESHOE CASINO CLEVELAND, ET AL.

DEFENDANTS-APPELLEES

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**JUDGMENT:**
DISMISSED

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-849942

**BEFORE:** E.A. Gallagher, P.J., Stewart, J., and Boyle, J.

**RELEASED AND JOURNALIZED:** August 10, 2017

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EILEEN A. GALLAGHER, P.J.:

**{¶1}** Plaintiff-appellant Scott Scheel appeals a decision of the Cuyahoga County Court of Common Pleas granting summary judgment in favor of defendant-appellee Atlantis Security Company ("Atlantis") on Scheel's claims arising out of a physical altercation between Scheel and another patron at the Horseshoe Casino. For the reasons that follow, we dismiss this appeal for lack of jurisdiction.

**{¶2}** On August 19, 2015, Scheel refiled a complaint[1] against Rock Ohio Caesars Cleveland, L.L.C. d.b.a. Horseshoe Casino Cleveland ("Horseshoe Casino" or the "casino") and Atlantis (collectively, the "defendants"), seeking to recover for injuries he allegedly sustained in a physical altercation with Scott Greggor on June 29, 2012 while the two men were playing blackjack at the Horseshoe Casino in Cleveland. Scheel alleged that the casino and Atlantis were responsible for his injuries by failing to promptly intervene. He asserted premises liability, dram shop liability, negligence, false imprisonment, respondeat superior and spoliation of evidence claims against the casino and negligence, false imprisonment, respondeat superior and spoliation of evidence claims against Atlantis.

**{¶3}** Atlantis and the casino filed answers denying any wrongdoing and asserting various affirmative defenses. In addition, Atlantis asserted counterclaims against

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[1]Scheel filed his original complaint in June 2013. He voluntarily dismissed his complaint without prejudice in August 2014.

Scheel for spoliation of evidence and frivolous conduct under R.C. 2323.51. Scheel filed a reply denying the material allegations of Atlantis' counterclaims and asserting various affirmative defenses.

**{¶4}** The defendants filed motions to dismiss Scheel's false imprisonment claims based on the statute of limitations that the trial court granted. The defendants filed motions for summary judgment on Scheel's remaining claims.

**{¶5}** On August 9, 2016, the trial court issued a journal entry granting Atlantis' motion for summary judgment. The trial court denied the casino's motion for summary judgment, concluding that genuine issues of material fact existed as to Scheel's claims against the casino. No mention was made of Atlantis' pending counterclaims.

**{¶6}** The case was reassigned to a visiting judge for trial, and the matter proceeded to trial on Scheel's claims against the casino. A few days into the trial, Scheel and the casino reached a settlement. On September 1, 2016, the visiting judge issued a journal entry that stated "[c]ase is dismissed with prejudice at Defendant's cost" and checked the box indicating that it was "final." This appeal followed.

**{¶7}** Before we can review the merits, we must first consider whether we have jurisdiction to hear this appeal. Our appellate jurisdiction is limited to reviewing orders that are both final and appealable. *See* Article IV, Section 3(B)(2), Ohio Constitution; R.C. 2505.02, 2505.03. "If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and the appeal must be dismissed." *Assn. of Cleveland Firefighters, # 93 v. Campbell*, 8th Dist. Cuyahoga No. 84148,

2005-Ohio-1841, ¶ 6. This court has a duty to examine, sua sponte, potential deficiencies in jurisdiction. *See, e.g., Arch Bay Holdings, L.L.C. v. Goler*, 8th Dist. Cuyahoga No. 102455, 2015-Ohio-3036, ¶ 9, citing *Saikus v. Ford Motor Credit Co.*, 8th Dist. Cuyahoga No. 77802, 2001 Ohio App. LEXIS 1696, *6 (Apr. 12, 2001); *see also Scanlon v. Scanlon*, 8th Dist. Cuyahoga No. 97724, 2012-Ohio-2514, ¶ 5 ("In the absence of a final, appealable order, the appellate court does not possess jurisdiction to review the matter and must dismiss the case sua sponte.").

**{¶8}** After this case was set for oral argument, we discovered a potential deficiency in our jurisdiction — i.e., that Atlantis' counterclaims appeared to be unresolved. Accordingly, we ordered the parties to submit supplemental briefs addressing the issue of "whether defendant-appellee Atlantis Security Company's counterclaims remain pending, thereby depriving this court of jurisdiction to hear this appeal." The parties filed supplemental appellate briefs addressing the issue. At the same time, Atlantis filed a notice of voluntary dismissal in the trial court, dismissing its counterclaims without prejudice pursuant to Civ.R. 41(C). Although the parties do not dispute that there was no resolution of Atlantis' counterclaims at the time Scheel filed his notice of appeal, they contend that there is no impediment to our jurisdiction to hear this appeal based on the pendency of Atlantis' counterclaims. We disagree.

**{¶9}** Where, as here, a matter involves multiple claims and parties, "[a]n order which adjudicates one or more but fewer than all the claims or the rights and liabilities of fewer than all the parties must meet the requirements of R.C. 2505.02 and Civ. R. 54(B)

in order to be final and appealable." *Noble v. Colwell*, 44 Ohio St.3d 92, 540 N.E.2d 1381 (1989), syllabus. Pursuant to Civ.R. 54(B), to be final and appealable, a judgment involving fewer than all claims or parties must include the trial court's express determination that there is "no just reason for delay." Absent such a determination, a decision that adjudicates fewer than all claims of all parties "shall not terminate the action as to any of the claims or parties" and "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).

**{¶10}** The trial court's order granting Atlantis' summary judgment motion disposed of Scheel's claims against Atlantis but did not dispose of Atlantis' counterclaims against Scheel. Neither the trial court's order granting Atlantis summary judgment nor the September 1, 2016 dismissal entry contained Civ.R. 54(B) language.

**{¶11}** Atlantis argues that because voluntary dismissals are "self-executing" and "effective on the date of filing," any issues with this court's jurisdiction were resolved when it voluntarily dismissed its counterclaims on June 2, 2017, nearly eight months after Scheel filed his notice of appeal. In support of its contention, Atlantis cites *Dewalt v. Tuscarawas Cty. Health Dept.*, 5th Dist. Tuscarawas No. 2012 AP 05 0031, 2012-Ohio-5294. In *Dewalt,* however, the notice of voluntary dismissal was filed before the filing of the notice of appeal. *Id.* at ¶ 21-24. Further, in that case, the appellate court found that it lacked jurisdiction to hear the appeal as a result of the filing of the voluntary dismissal. *Id.* at ¶ 31.

**{¶12}** "It is a fundamental principle of appellate jurisdiction that jurisdiction is determined at the time the notice of appeal is filed." *Rojas v. Concrete Designs, Inc.*, 8th Dist. Cuyahoga Nos. 103418 and 103420, 2017-Ohio-379, ¶ 12. Lack of jurisdiction at the time of appeal cannot be "fixed" by actions taken after a notice of appeal has been filed. *See, e.g., id.* ("appellate jurisdiction is something that either exists or does not exist at the time the notice of appeal is filed — subsequent action by the court of appeals cannot make final what was previously not final"). Accordingly, Atlantis' voluntary dismissal of its counterclaims after Scheel filed his appeal was filed did not transform the trial court's ruling on summary judgment into a final, appealable order.

**{¶13}** Scheel argues that this court has jurisdiction to hear his appeal because the trial court's August 9, 2016 order granting Atlantis' motion for summary judgment and its September 1, 2016 dismissal entry "taken together" rendered Atlantis' counterclaims moot.

**{¶14}** Even if all claims involving all parties are not expressly adjudicated by the trial court, "if the effect of the judgment as to some of the claims is to render moot the remaining claims or parties, then compliance with Civ.R. 54(B) is not required to make the judgment final and appealable." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 21, 540 N.E.2d 266 (1989); *see also Wise v. Gursky*, 66 Ohio St.2d 241, 243, 421 N.E.2d 150 (1981) ("[A] judgment in an action which determines a claim in that action and has the effect of rendering moot all other claims in the action as to all other

parties to the action is a final appealable order pursuant to R.C. 2505.02, and Civ. R. 54(B) is not applicable to such a judgment.").

**{¶15}** Although Atlantis' spoliation of evidence claim may have been mooted when it prevailed on its summary judgment motion,[2] its counterclaim for frivolous conduct, seeking an award of attorney fees and costs under R.C. 2323.51, remained.

**{¶16}** Ohio courts have recognized that requests for sanctions under R.C. 2323.51 may be brought by counterclaim as well as by motion. *See, e.g., Krlich v. Shelton,* 11th Dist. Trumbull No. 2016-T-0003, 2016-Ohio-3292, ¶ 3, fn. 1 ("A request for sanctions and attorney fees for frivolous conduct and abuse of process, in violation of R.C. 2323.51, may be made by motion or by counterclaim."), citing *Craine v. ABM Servs., Inc.*, 11th Dist. Portage No. 2011-P-0028, 2011-Ohio-5710, ¶10; *Texler v. Papesch*, 9th Dist. Summit No. 18977, 1998 Ohio App. LEXIS 4070, *5, *7 (Sept. 2, 1998) ("Although [R.C. 2323.51] does not specify whether a party can make a claim for attorney's fees in the form of a counterclaim, the case law makes clear that it is an accepted method."); *see also Univ. Commons Assoc. Ltd. v. Commercial One Asset Mgt.,*

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[2] Atlantis' counterclaim for spoliation of evidence was based on Scheel's alleged destruction of videos that Atlantis contended "disrupted" its defense. Given that Atlantis prevailed on summary judgment without the video evidence, an argument could be made that its defense was not, in fact, impaired by the alleged destruction of the videos. Further, Atlantis' counterclaim for spoliation of evidence does not include a specific allegation of damages resulting from the spoliation of evidence. Atlantis simply alleges that "[a]s a direct and proximate result of Plaintiff's spoliation of evidence, [Atlantis'] defense of this case has been disrupted and [Atlantis] may experience difficulty in its defense against claims made by Plaintiff." Such an allegation seems directed more towards a request for a spoliation inference than an award of damages or other relief. We need not resolve this issue because, in any event, there has been no adjudication of Atlantis' counterclaim for frivolous conduct, which has not been rendered moot.

*Inc.*, 8th Dist. Cuyahoga No. 85202, 2005-Ohio-4568, ¶ 20, fn. 7 (suggesting that allegations of frivolous conduct "could have been brought as a counterclaim").

**{¶17}** The trial court's September 1, 2016 dismissal entry is ambiguous. "Journal entries must be construed, as any other written instruments, by giving the language of the journal entry its ordinary meaning." *PNC Bank, N.A. v. Bramson*, 8th Dist. Cuyahoga No. 97626, 2012-Ohio-2209, ¶ 11. However, an ambiguous journal entry "requires interpretation." *Id.* A journal entry is ambiguous "'if its terms cannot be clearly determined from a reading of the entire [entry] or if its terms are susceptible to more than one reasonable interpretation.'" *Id.*, quoting *Militiev v. McGee*, 8th Dist. Cuyahoga No. 94779, 2010-Ohio-6481, ¶ 30. Where a journal entry is ambiguous, "the entire record may be examined and the [entry] construed accordingly." *Ridge v. AMC*, 4th Dist. Jackson No. 93CA719, 1994 Ohio App. LEXIS 5560, *8-9 (Dec. 6, 1994), citing *Hines v. Aetna Cas. & Sur. Co.,* 8th Dist. Cuyahoga No. 59600, 1992 Ohio App. LEXIS 47 (Jan. 9, 1992), and 46 *American Jurisprudence 2d*, Judgments, Section 76, 364 (1969); *see also Lurz v. Lurz*, 8th Dist. Cuyahoga No. 93175, 2010-Ohio-910, ¶ 17 ("The appellate court should examine the entire record to discern the meaning of the judgment entry when the judgment is unclear or ambiguous.").

**{¶18}** The September 1, 2016 dismissal entry was entered by the visiting judge after Scheel and the casino reached a settlement in the middle of trial. There is nothing in the record to indicate that Atlantis' counterclaims were part of the trial. Atlantis did not submit any pretrial filings and no mention is made of Atlantis' counterclaims in the

pretrial filings submitted by Scheel and the casino. The September 1, 2016 dismissal entry references only a single defendant and imposes costs on that defendant, i.e., "[c]ase is dismissed with prejudice at *Defendant's* costs." (Emphasis added.) Thus, we conclude that when the trial court dismissed the "case" with prejudice, it was referring only to Scheel's claims against the casino and did not thereby dispose of Atlantis' counterclaims, which had not been dismissed by Atlantis or otherwise adjudicated by the trial court. *See Assn. of Cleveland Firefighters, # 93*, 2005-Ohio-1841, at ¶ 15 (interpreting trial court's order denying "plaintiff's motion for equitable relief" in a case where four plaintiffs jointly filed one complaint that included a request for equitable relief as failing to dispose of all the claims of the parties and dismissing appeal, sua sponte, for lack of a final appealable order). The September 1, 2016 journal entry did not include a determination under Civ.R. 54(B) that there was "no just reason for delay."

**{¶19}** Scheel argues that Atlantis' failure to participate in the trial "indicates [its] intent to abandon" its counterclaim for frivolous conduct and that the trial court's September 1, 2016 dismissal entry, therefore, "had the effect of rendering the frivolous conduct claim moot * * * for failure to prosecute the claim." Scheel cites no authority in support of this proposition. As this court has previously stated: "Abandoning a claim will not result in a final order under Civ.R. 54(B) because abandonment does not result in a final disposition. 'To allow a court to find implicitly that one party abandoned his claim would thus significantly alter the definition of a final, appealable order. We decline to make such an alteration.'" *Rojas*, 2017-Ohio-379, at ¶ 6, quoting *IBEW,*

*Local Union No. 8 v. Vaughn Indus., L.L.C.*, 116 Ohio St.3d 335, 2007-Ohio-6439, 879 N.E.2d 187, ¶ 11.

**{¶20}** Pursuant to Civ.R. 41(B)(1), "[w]here the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." This provision is also applicable to counterclaims. *See* Civ.R. 41(C) ("The provisions of this rule apply to the dismissal of any counterclaim * * *[.]"). However, there is nothing in the record to indicate that the trial court dismissed Atlantis' counterclaims for failure to prosecute.

**{¶21}** Because there has been no disposition of Atlantis' counterclaims by the trial court, there is no final, appealable order. As such, we lack jurisdiction and must dismiss this appeal. *See, e.g., Demsey v. Sheehe,* 8th Dist. Cuyahoga No. 100693, 2014-Ohio-2409, ¶ 9-14 (dismissing appeal for lack of a final, appealable order where trial court order did not dispose of counterclaims or include Civ.R. 54(B) language in its order dismissing complaint); *McKibben v. U.S. Restoration & Remodeling, Inc.,* 10th Dist. Franklin No. 14AP-737, 2015-Ohio-1241, ¶ 21-22 (appellate court lacked jurisdiction to consider plaintiff's appeal of summary judgment ruling where judgment did not contain Civ.R. 54(B) language and defendants' counterclaims seeking attorney fees from plaintiff's counsel for frivolous conduct under R.C. 2323.51 remained unresolved).

**{¶22}** Appeal dismissed.

It is ordered that appellee recover from appellant the costs herein taxed.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

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

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EILEEN A. GALLAGHER, PRESIDING JUDGE

MELODY J. STEWART, J., CONCURS;
MARY J. BOYLE, J., DISSENTS WITH SEPARATE OPINION

MARY J. BOYLE, J., DISSENTING:

**{¶23}** I respectfully dissent. I would find that this court has jurisdiction to hear the appeal and would affirm.

**{¶24}** During trial, the Horseshoe Casino and Scheel settled their claims, and the trial court issued a "final" judgment that stated: "*the case is dismissed with prejudice at defendant's cost*." (Emphasis added.) "A dismissal with prejudice is, obviously, a final judgment on the merits." *Myers v. State Farm Ins.*, 8th Dist. Cuyahoga No. 81162, 2003-Ohio-174, ¶ 13, citing *Briggs v. Cincinnati Recreation Comm. Office Mike Thomas*, 132 Ohio App.3d 610, 611, 725 N.E.2d 1161 (1st Dist.1998).

**{¶25}** Here, the trial court's entry dismissed the entire "case." The word "case" is synonymous with "action." *See In re Appeal of Sergent*, 49 Ohio Misc. 36, 38, 360 N.E.2d 761 (C.P.1976). Consequently, the court's dismissal encompassed all of the

claims involved in the case, including Atlantis' counterclaims, and not just those claims between the Horseshoe Casino and Scheel.

**{¶26}** Moreover, the dismissal was an adjudication on the merits under Civ.R. 41(B)(3), which provides that "[a] dismissal under division (B) of this rule and any dismissal not provided for in this rule * * * operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies." The "case is dismissed with prejudice" language used by the trial court was an adjudication on the merits as to all of the claims pending in the case. It constituted a final judgment because it disposed of all the claims and left nothing else for adjudication. *See Myers* (dismissal of a "case" with prejudice as to all parties is a final order of the court and an appeal fails on its merits if there is no challenge to the order of dismissal).

**{¶27}** This appeal is properly before us to review. And because Scheel only appealed from the judgment granting Atlantis' motion for summary judgment and did not challenge the final order of dismissal, I would affirm.