

[Cite as *Miller v. Foster*, 2009-Ohio-2675.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

CORENE MILLER,
ADMINISTRATRIX FOR THE ESTATE
OF: JORENE HARRISON

C.A. Nos. 24186 and 24209

Appellee/Cross-Appellant

v.

CHARLOTTE FOSTER, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2007 02 1184

Appellants/Cross-Appellees

DECISION AND JOURNAL ENTRY

Dated: June 10, 2009

MOORE, Presiding Judge

{¶1} Appellant/Cross-Appellees, Charlotte Foster, et al., and Appellee/Cross-Appellant, Corene Miller, appeal from the judgment of the Summit County Court of Common Pleas. This Court dismisses the appeal.

I.

{¶2} This case arises out of a tragic car accident that occurred on July 27, 2006 in Akron, Ohio. The vehicle at issue, a passenger van, was driven by Appellant/Cross-Appellee Charlotte Foster, an employee of Appellant/Cross-Appellee Evant, Inc. Evant is a nonprofit agency that provides residential services to individuals with mental and developmental disabilities. At the time the accident occurred, Foster was transporting Evant resident Jorene Harrison to a doctor's appointment. Harrison was seated in the backseat of the van and was

thrown from the van when it collided with a tractor-trailer driven by Calvin Givens. Harrison passed away as a result of the accident.

{¶3} At the time of the accident, Harrison was 71 years old. Harrison was mentally disabled and had the mental capacity of a four-year old child. Foster was working as a Developmental Skills Technician. As part of her responsibilities, Foster often transported residents to various events and appointments. During her 20 years of employment with Evant, Foster had never been in an automobile accident and had not received a speeding ticket.

{¶4} On February 9, 2007, Corene Miller, as Administratrix of the Estate of Jorene Harrison (hereinafter “the Estate”), filed a complaint alleging seven claims against Evant, Foster and several John Doe defendants in the Summit County Court of Common Pleas. On March 21, 2008, the Estate filed a notice of dismissal, pursuant to Civ.R. 41(A)(1)(a) of three of the claims asserted against Evant. In addition, the Estate dismissed the John Doe defendants. The matter proceeded to trial on March 25, 2008. On March 28, 2008, the jury returned a verdict in favor of the Estate and against Foster and Evant. The jury awarded \$800,000 in damages. Of this award, \$200,000 constituted damages for the survival claim for conscious pain and suffering and \$600,000 constituted damages for the wrongful death claim. The judgment on the verdict was entered on April 1, 2008.

{¶5} On April 2, 2008, the Estate filed a motion for prejudgment interest. Evant opposed the motion. On April 15, 2008, Evant filed a motion for new trial as well as a motion for judgment notwithstanding the verdict. The Estate opposed the motions. On May 5, 2008, the trial court denied Evant’s motions as well as the Estate’s motion for prejudgment interest. On April 30, 2008, Evant filed its notice of appeal. On May 12, 2008, the Estate filed its notice of cross-appeal. Thereafter, this Court consolidated the appeals. On appeal, Evant has raised four

assignments of error for our review. On cross-appeal, the Estate has raised two assignments of error.

II.

EVANT'S ASSIGNMENT OF ERROR I

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING JAMES P. BRESSI, D.O. TO TESTIFY ABOUT CONSCIOUS PAIN AND SUFFERING.”

EVANT'S ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED IN DENYING EVANT'S MOTION FOR DIRECTED VERDICT ON PUNITIVE DAMAGES.”

EVANT'S ASSIGNMENT OF ERROR III

“THE TRIAL COURT ERRED IN DENYING EVANT'S MOTION FOR NEW TRIAL[.]”

EVANT'S ASSIGNMENT OF ERROR IV

“THE TRIAL COURT ERRED IN DENYING EVANT'S JNOV MOTION[.]”

THE ESTATE'S ASSIGNMENT OF ERROR I

“THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE ESTATE'S MOTION FOR PREJUDGMENT INTEREST.”

THE ESTATE'S ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED TO THE PREJUDICE OF THE ESTATE WHEN IT INCLUDED OTHER FORMS OF MALICE IN ITS JURY INSTRUCTIONS ON PUNITIVE DAMAGES.”

{¶6} In Evant's assignments of error, it argues that the trial court erred by permitting Dr. Bressi to testify about conscious pain and suffering and in denying its motions for directed verdict, new trial and for judgment notwithstanding the verdict. In the Estate's assignments of error, it argues that the trial court abused its discretion in denying the Estate's motion for

prejudgment interest and erred in including other forms of malice in its jury instructions on punitive damages.

{¶7} “As a threshold issue, we are required to raise sua sponte issues pertaining to our jurisdiction.” *State v. Keith*, 9th Dist. No. 08CA009362, 2009-Ohio-76, at ¶5. See *State ex rel. White v. Cuyahoga Metro. Hous. Auth.* (1997), 79 Ohio St.3d 543, 544 (observing that whether subject-matter jurisdiction properly lies may be raised sua sponte by an appellate court). As we further explain herein, we lack jurisdiction to entertain the appeals.

{¶8} On March 21, 2008, the Estate filed a notice of dismissal, pursuant to Civ.R. 41(A)(1)(a), of three of the claims it asserted against Evant. These claims included negligent hiring, negligent entrustment and intentional and/or reckless infliction of emotional distress. On April 1, 2008, the trial court entered judgment on the jury’s verdict in favor of the Estate and against Foster and Evant in the amount of \$800,000. On April 2, 2008, the Estate filed a motion for prejudgment interest. On April 15, 2008, Evant filed a motion for new trial as well as a motion for judgment notwithstanding the verdict. On May 5, 2008, the trial court denied Evant’s motions for new trial and for judgment notwithstanding the verdict as well as the Estate’s motion for prejudgment interest.

{¶9} Pursuant to Civ.R. 41(A)(1)(a), a plaintiff “may dismiss all claims asserted by that plaintiff against a defendant by *** filing a notice of dismissal at any time before the commencement of trial[.]” The rule “does not allow for the dismissal of a portion of the claims against a certain defendant.” *Pattison v. W.W. Grainger Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276, at ¶18; see also *Dohme v. Eurand America, Inc.*, 121 Ohio St.3d 277, 2009-Ohio-506, at ¶3. Thus, the Estate’s attempt to dismiss only three of the six claims it asserted against Evant was a nullity because it attempted to dismiss some, but not all, of its claims against Evant. *Pattison*,

supra, at ¶19. If the Estate wished to abandon some of its claims, the proper procedure would have been to seek leave of court or consent of the opposing parties to amend the complaint under Rule 15(A) of the Ohio Rules of Civil Procedure. Id.

{¶10} Under Civ.R. 54(B), a trial 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.” Neither the trial court’s April 1 or May 5 judgment entry included Rule 54(B) language, nor did these entries dispose of all claims against all parties. Therefore, they were not final and appealable. Accordingly, this Court lacks jurisdiction to entertain the appeals. As the Estate’s attempt to voluntarily dismiss the negligent hiring, negligent entrustment and intentional and/or reckless infliction of emotional distress claims was a nullity, those claims remain pending in the trial court and absent a final appealable order, we lack jurisdiction to consider the merits of this appeal. See Id. at ¶19, citing *Kildow v. Home Town Improvements*, 5th Dist. No. CT2001-0057, 2002-Ohio-3824, at ¶11.

Appeals dismissed.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant/Cross-Appellee.

CARLA MOORE
FOR THE COURT

CARR, J.
BELFANCE, J.
CONCUR

APPEARANCES:

AMY S. THOMAS, and KEVIN P. FOLEY, Attorneys at Law, for Appellant/Cross-Appellee.

ROBERT C. MEEKER, Attorney at Law, for Appellee/Cross-Appellee..