[Cite as *Ricciardi v. D'Apolito*, 2010-Ohio-1016.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

SANTUCCIO RICCIARDI, M.D.	)	CASE NO. 09 MA 60
	)	
and	)	
	)	
BOARDMAN SPECIALTY CARE AND REHABILITATION CENTER	)	OPINION AND JUDGMENT ENTRY
	)	
PETITIONERS	)	
	)	
VS.	)	
	)	
JUDGE LOU A. D'APOLITO	)	
	)	
RESPONDENT	)	

CHARACTER OF PROCEEDINGS: Petition for Writ of Prohibition

JUDGMENT: Petition Granted.

APPEARANCES:

For Petitioners:

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Atty. Christopher J. Baronzzi
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For Respondent:

Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Linette M. Stratford
Chief Assistant Prosecutor
21 West Boardman Street, 6th Floor
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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: March 12, 2010

PER CURIAM.

{¶1} Petitioners Santuccio Ricciardi, M.D., and Boardman Specialty Care and Rehabilitation Center filed a petition for writ of prohibition on April 2, 2009. Petitioners argue that Respondent Judge Lou A. D'Apolito has no jurisdiction to issue further orders in Mahoning County Court of Common Pleas Case No. 07 CV 4032. Petitioners are the defendants in that case. Petitioners contend that the trial judge filed a final appealable order disposing of all issues in the matter on August 22, 2008. Petitioners were the prevailing parties in that order. The trial judge subsequently vacated the judgment entry on September 24, 2008, in response to a motion for reconsideration filed by the plaintiff in that case. Petitioners contend that the judgment entry of September 24, 2008, is void ab initio because the common pleas court lost jurisdiction to modify the case on August 22, 2008. Respondent is the trial court judge now presiding over Case No. 07 CV 4032, and Petitioners are seeking this writ of prohibition to prevent Respondent from issuing further orders or exercising jurisdiction in that case. For the following reasons, we grant the writ.

{¶2} A writ of prohibition is an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior tribunal commanding it to cease abusing or usurping judicial functions. *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 73, 701 N.E.2d 1002. In order to obtain a writ of prohibition, the petitioner must prove: (1) that the court or officer against whom the writ is sought is about to

exercise judicial or quasi-judicial power; (2) the exercise of that power is unauthorized by law; and (3) denying a writ will result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. White v. Junkin* (1997), 80 Ohio St.3d 335, 336, 686 N.E.2d 267. If a lower court patently and unambiguously lacks jurisdiction over the cause, prohibition will issue to prevent any future unauthorized exercise of jurisdiction and to correct the results of prior jurisdictionally unauthorized actions. *State ex rel. Fraternal Order of Police, Ohio Labor Council, Inc. v. Franklin Cty. Court of Common Pleas* (1996), 76 Ohio St.3d 287, 289, 667 N.E.2d 929.

{¶3} On October 26, 2007, Plaintiff Russell Clifton filed a civil complaint against Petitioners alleging medical malpractice. Petitioners filed a motion for summary judgment. The Mahoning County Court of Common Pleas ruled on the motion on August 22, 2008. The court found in favor of Petitioners, sustaining the motion for summary judgment and granting judgment as a matter of law. On September 12, 2008, the plaintiff filed a motion for reconsideration. The motion for reconsideration was granted on September 24, 2008. On October 10, 2008, Petitioners filed a motion to strike from the record the motion for reconsideration and the court's order granting the motion. The matter was heard before a magistrate, who denied Petitioners' motion to strike on February 6, 2009. Petitioners filed objections to the magistrate's decision, which were overruled by the trial court on March 3, 2009. This petition for writ of prohibition followed on April 2, 2009.

{¶4} It is well-established that a motion for reconsideration filed in a civil action after final judgment has been issued is a nullity. *Pitts v. Ohio Dept. of Transp.*

(1981), 67 Ohio St.2d 378, 423 N.E.2d 1105. The only means to relief from judgment is spelled out in the procedure provided in Civ.R. 50 (motion notwithstanding the verdict), Civ.R. 59 (motion for new trial) or Civ.R. 60 (motion for relief from judgment). *Pitts* at 380. Any decision entered pursuant to a motion for reconsideration filed after a final judgment is also a nullity. *Pitts* at 381; *State ex rel. Clark v. Lile* (1997), 80 Ohio St.3d 220, 685 N.E.2d 535. A writ of prohibition will lie to prevent further action on a null and void judgment. *McAuley v. Smith* (1998), 82 Ohio St.3d 393, 395, 696 N.E.2d 572.

{¶5} The record before us reflects that the trial court entered judgment on a motion for reconsideration of a decision filed on August 22, 2008, in Case No. 07 CV 4032. Respondent argues, though, that the August 22, 2008, entry was not a final *appealable* order because a claim for attorney's fees remained pending. Respondent thus contends that the entry reflected an interlocutory order, and not a final order. Respondent argues that, pursuant to Civ.R. 54(B), any order that does not dispose of all pending claims and parties must include an express determination that there is no just reason for delay in order to constitute a final appealable order. There is no Civ.R. 54(B) "no just reason for delay" language in the August 22, 2008, judgment entry, hence, this entry did not become final and appealable under Civ.R. 54(B). According to Respondent, since there was an outstanding claim pending for attorney's fees, then the trial court had the power to modify this interlocutory order at any time. Under these circumstances, the trial court did not err in vacating the August 22, 2008, entry, and Respondent asserts that this petition for writ of prohibition should be denied.

{¶6} Respondent's initial analysis is correct. An 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. Rule 54(B) makes mandatory the use of the language, "there is no just reason for delay." Unless those (or substantially similar) words appear where multiple claims and/or multiple parties exist, the order is subject to modification and it cannot be either final or appealable. *Jarrett v. Dayton Osteopathic Hospital, Inc.* (1985), 20 Ohio St.3d 77, 77-78, 20 OBR 407, 486 N.E.2d 99. There is no Civ.R. 54(B) "no just reason for delay" language in the trial court's judgment entry. Hence, if there is a pending claim for attorney fees, the order cannot constitute a final appealable order and may be modified, whether through a motion filed by a party or sua sponte by the court, at any time.

{¶7} Respondent cites *Internatl. Bhd. of Electrical Workers, Local Union No. 8 v. Vaughn Industries, L.L.C.*, 116 Ohio St.3d 335, 2007-Ohio-6439, 879 N.E.2d 187, in support. In *Vaughn*, the electrical workers union brought action against an employer alleging an intentional violation of the Ohio's Prevailing Wage Law pursuant to R.C. 4115.03 et seq. The employer's answer included a request for statutory attorney's fees. The trial court granted the employer's motion for summary judgment, but did not dispose of the claim for attorney's fees. The union appealed, and the Sixth District Court of Appeals dismissed the appeal as premature. Ultimately, the Ohio Supreme Court held: "When attorney fees are requested in the original pleadings, an order that does not dispose of the attorney-fee claim and does not include, pursuant to Civ.R. 54(B), an express determination that there is no just

reason for delay, is not a final, appealable order." Id. at paragraph two of the syllabus. The Court affirmed the decision of the appellate court that the appeal was premature.

{¶8} Respondent contends that Petitioners requested an award of attorney fees in paragraph 17 of their answer to the complaint by stating: "Plaintiff lacks a reasonable good faith basis to bring this medical claim, thereby entitling Defendant to an award of attorney's fees and costs against Plaintiff as provided by O.R.C. §2323.42." The question presented is whether Petitioners' reference to R.C. 2323.42 and the related request for attorney fees in the answer to the complaint, prevented the August 22, 2008, judgment from being a final appealable order at the time the trial court modified the order on September 24, 2008.

{¶9} Two courts have limited the application of *Vaughn* by holding that the mere mention of attorney's fees in the answer to the complaint does not rise to the level of a separate claim for relief preventing a judgment from becoming a final appealable order. See *Knight v. Colazzo*, 9th Dist. No. 24110, 2008-Ohio-6613, ¶9; *Jones v. McAlarney Pools, Spas & Billiards, Inc.*, 4th Dist. No. 07CA34, 2008-Ohio-1365, ¶12. These two courts were concerned that an overly broad application of the *Vaughn* holding would require the dismissal of practically every civil appeal on jurisdictional grounds because most complaints contain a pro forma request for attorney's fees and this request is usually ignored by the trial court when final judgment is rendered. The courts in these cases also acknowledge, however, that the *Vaughn* holding would apply if the request for attorney's fees was made pursuant to an express statute rather than as vague, unspecified or unsubstantiated request

for attorney's fees. See *Knight* at ¶8-9; *Jones* at ¶11. We agree with the holdings and reasoning of the *Knight* and *Jones* cases.

{¶10} Initially, it would appear that *Vaughn* presents a quick and simple resolution of this case. As Petitioners sought attorney fees pursuant to a specific statute, *Vaughn* appears to apply, preventing the August 22, 2008, judgment from being a final appealable order. If this is true, the trial court had the power to modify the judgment on September 24, 2008, and we should deny the petition for writ of prohibition. Based on a closer inspection of the actual attorney fee statute at issue here, though, we are compelled to reach a different conclusion.

{¶11} In the instant case, Petitioners requested attorney's fees pursuant to R.C. 2323.42. R.C. 2323.42(D) requires Petitioners to first file a, "notice of demand for dismissal and intention to file a good faith motion," prior to filing an actual motion for attorney fees. Petitioner Ricciardi included a request for statutory attorney fees as part of his answer to the medical malpractice complaint filed by Russell Clifton. This notice of demand for dismissal satisfied the requirements of R.C. 2323.42(D), thus opening the door for a possible attorney fee award. The next step in the process towards actual recovery of attorney fees is to file a motion for these fees pursuant to R.C. 2323.42(A). Ricciardi did not file such a motion. R.C. 2323.42(A), requires that, "*[t]he defendant shall file the motion* not earlier than the close of discovery in the action and *not later than thirty days after the court or jury renders any verdict* or award in the action." (Emphasis added.)

{¶12} The record before us reflects that the trial court reached its verdict on August 22, 2008. If Petitioner Ricciardi actively sought to recover attorney fees under

R.C. 2323.42, he was required to file a motion for attorney fees by September 22, 2008. He did not. Instead, the record indicates that the plaintiff filed a motion for reconsideration on September 12, 2008. The trial court ruled on the motion on September 24, 2008. By that date, Petitioner Ricciardi had clearly missed his deadline for filing any motion for attorney fees pursuant to R.C. 2323.42(A).

{¶13} Based on the timing of the events in Case No. 07 CV 4032, we can only conclude that the trial court's August 22, 2008, judgment did not become a final appealable order until September 22, 2008. Prior to that date, Petitioner Ricciardi still had the ability to file his motion for attorney fees under R.C. 2323.42(A). While that option to file a motion for attorney fees still existed, according to our understanding of *Vaughn*, the August 22, 2008, judgment could not be treated as a final appealable order. Once that option expired after the 30-day deadline for filing a motion for attorney fees passed, the judgment became final and appealable. Hence, the trial court was not permitted to modify or vacate the judgment except through the filing of an appropriate motion as set forth in the Rules for Civil Procedure. Plaintiff could have filed a Civ.R. 60(B) motion pursuant to the Civil Rules. Plaintiff did not file this, or any other appropriate, motion. Instead, he filed a nullity labeled as a motion for reconsideration. On September 24, 2008, the trial court had no basis for vacating or modifying the judgment rendered on August 22, 2008, and Petitioners are entitled to their writ of prohibition.

{¶14} While we must come to this conclusion based on the record and the law involved, we do have some misgivings about the result. First, the outcome here is tantamount to a ruling by this Court, in an ancillary action, on the appellate status of a

case that has not actually been appealed to this Court. Further, in granting the writ of prohibition, we are in essence making the determination that no party may file an appeal in Case No. 07 CV 4032, since we have concluded that the judgment rendered on August 22, 2008, was a final, appealable order and the deadline for filing any appeal has long passed. This unfortunate side effect of our ruling today only reemphasizes the extraordinary nature of a writ of prohibition, and reminds us that such a writ is to be granted only on rare occasions. Ultimately, we must conclude that this case presents one of those rare occasions, and Petitioners are hereby granted their writ of prohibition. Respondent's motion for summary judgment is overruled. The August 22, 2008, judgment is reinstated, the Motion for Reconsideration is stricken, and the September 24, 2008, Order is vacated.

{¶15} Costs taxed against Respondent. Final order. Clerk to serve notice as provided by the Civil Rules.

Waite, J., concurs.

Vukovich, P.J., concurs.

DeGenaro, J., concurs in judgment only with concurring opinion.

DeGenaro, J., concurring in judgment only with concurring opinion.

{¶16} While I concur with much of the analysis contained in the majority opinion and the overall decision to grant the writ, I write separately because I disagree with the majority's conclusion that the trial court's August 22, 2008, judgment did not become a final and appealable order until September 22, 2008.[1]

{¶17} R.C. 2323.42 mandates a two-step process with regard to the request for attorney fees by a prevailing defendant in a medical malpractice action. First the prevailing defendant must file a notice of demand for dismissal and intention to file a good faith attorney fee motion. R.C. 2323.42(D). Second, the defendant must file an actual motion for attorney fees pursuant R.C. 2323.42(A). This motion shall be filed "not earlier than the close of discovery in the action and not later than thirty days after the court or jury renders any verdict or award in the action." R.C. 2323.42(A).

{¶18} Here, Petitioner Boardman filed neither the required notice nor a motion for attorney fees. Petitioner Ricciardi did file the statutorily mandated notice, and thus if he sought to recover attorney fees he was required to file a motion thirty days after the trial court granted summary judgment in favor of Petitioners. In other words, Ricciardi had the *option* to file a motion for attorney fees during the thirty days following the August 22, 2008 judgment.

{¶19} However, the existence of this option did not prevent the August 22, 2008 order from becoming final and appealable. In my view, only if Ricciardi had filed a motion for attorney fees pursuant to R.C. 2323.42(A) would the finality of the August 22, 2008 judgment have been affected.

{¶20} Analogously, a litigant has the option to file a motion for new trial pursuant to Civ.R. 59(B), or a motion notwithstanding the verdict pursuant to Civ.R. 50(B), within 14 days after the entry of judgment. However, the *existence* of that option does not affect the finality of the judgment, nor toll the time for filing an appeal. Only if a motion is timely filed is the appeal time *tolled*. See App.R. 4(B)(2) ("In a civil

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[1] Because the thirtieth day for App.R. 4 and R.C. 2323.4 purposes fell on Sunday, September 21, 2008, the last day to file a notice of appeal and/or motion for attorney fees was Monday, September 22, 2008. App.R. 14(A).

case * * * if a party files a timely motion for judgment under Civ.R. 50(B), [or] a new trial under Civ.R. 59(B), * * * the time for filing a notice of appeal begins to run as to all parties when the order disposing of the motion is entered.") The time within which to file a notice of appeal starts to run from the entry of judgment, not 14 days thereafter if a litigant could have, but did not, file a motion for new trial or for judgment notwithstanding the verdict. Stated another way, applying the majority's rationale here to the motion for new trial/JNOV analogy, a litigant would have 44 days to file a notice of appeal.

{¶21} Thus, in light of the fact that there was no motion for attorney fees pending, I would hold that the trial court's August 22, 2008 judgment was a final appealable order on that date. I disagree with the majority's conclusion that the trial court's August 22, 2008 judgment did not become a final and appealable order until September 22, 2008, simply because Ricciardi had the option to file an attorney fee motion until September 22, 2008. This in effect would give the plaintiff in the underlying case a 60-day time frame within which to file a notice of appeal.

{¶22} Hypothetically, had the plaintiff filed a timely notice of appeal rather than the motion for reconsideration, either before or after Ricciardi had filed a motion for attorney fees, a direct appeal would have been preserved. There would have been several options for this court in the context of that appeal, e.g., staying the appeal and issuing a limited remand so the trial court could consider the merits of the attorney fee motion; or finding that the notice of appeal was premature and treating it as filed immediately after the trial court had ruled on the attorney fee motion, pursuant to App.R. 4(C).

{¶23} Finally, I do not share the majority's misgivings about the result of our decision. The situation presented in this case is quite rare, and it draws attention to gaps in the statutory scheme which ultimately falls to the legislature to address. Moreover, the plaintiff in the underlying case had the opportunity to file a notice of appeal within 30 days of the final judgment, but instead chose to file a motion for reconsideration, which is a nullity. The fact that the underlying case cannot be

appealed is an unfortunate side effect of the plaintiff's litigation tactics, not of this court's decision to grant the writ.