IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

TERESA NICHOLS,	:	APPEAL NO. C-210224 TRIAL NO. A-1601569
and	:	
BRAD NICHOLS,	:	*O P I N I O N.*
Plaintiffs-Appellees,	:	
vs.	:	
ABUBAKAR ATIQ DURRANI, M.D.,	:	
and	:	
CENTER FOR ADVANCED SPINE TECHNOLOGIES, INC.,	:	
Defendants-Appellants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Appeal Dismissed

Date of Judgment Entry on Appeal: August 27, 2021

The Deters Law Firm, Robert A. Winter, Benjamin Maraan, and *Alex Petraglia,* for Plaintiffs-Appellees,

Taft Stettinius & Hollister, LLP, Aaron M. Herzig, Russell S. Sayre, Philip D. Williamson and *Anna M. Greve,* for Defendants-Appellants.

BERGERON, Presiding Judge.

{¶1} Plaintiffs-appellees Teresa and Brad Nichols filed suit against Dr. Durrani and the Center for Advanced Spine Technologies (CAST) in March 2016, alleging various forms of medical malpractice. Following a jury trial and verdict for the plaintiffs, all parties filed postjudgment motions. Dr. Durrani and CAST moved for judgment notwithstanding the verdict, a new trial, or remittitur, while the Nichols filed a motion for prejudgment interest and attorney fees. The trial court issued an order resolving the defense motion and entered judgment for the Nichols. But before the trial court had a chance to rule on the motion for prejudgment interest and attorney fees, the Nichols withdrew it. Unsure whether this withdrawal endowed the trial court's previous order with finality, Dr. Durrani and CAST filed a notice of appeal within 30 days. *See* App.R. 4(A)(2) ("[A] a party who wishes to appeal from an order that is not final upon its entry but subsequently becomes final * * * shall file the notice of appeal required by App.R. 3 within 30 days of the date on which the order becomes final.").

{¶2} Having identified uncertainty as to the finality of judgment, this court sua sponte ordered the parties to submit supplemental briefing regarding our jurisdiction. We received only one such brief, in which Dr. Durrani and CAST acknowledge that the court lacks jurisdiction and suggest that their notice of appeal should be treated as premature. We agree regarding the lack of finality and issue this opinion to offer clarity to future parties who find themselves in a similar predicament.

{¶3} "A trial court order is a final, appealable order only if it satisfies the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B)." *Morris v. Morris*, 8th Dist. Cuyahoga No. 109854, 2021-Ohio-2677, ¶ 30. The applicability of Civ.R. 54(B)

to postjudgment motions under R.C. 2505.02(B)(2) is a matter of some dispute among Ohio courts. *See, e.g., Zhong v. Liang*, 2020-Ohio-3724, 155 N.E.3d 1042, ¶ 18 (8th Dist.) ("While Civ.R. 54(B) clearly applies to R.C. 2505.02(B)(1) * * * it is less clear whether Civ.R. 54(B) applies to R.C. 2505.02(B)(2)."); *Garden v. Langermeier*, 2017-Ohio-972, 86 N.E.3d 645, ¶ 13, fn. 1 (8th Dist.) (same). But we need not address the implications of Civ.R. 54(B) here, because we find that the time frame for filing a notice of appeal in this case has not yet begun under App.R. 4(B)(2).

{¶4} "Under App.R. 4(A), a party has 30 days to appeal a final judgment. In a civil case, however, when certain postjudgment motions are filed, the time for filing a notice of appeal does not begin to run until the order disposing of all postjudgment motions is entered." *Luri v. Republic Servs., Inc.*, 8th Dist. Cuyahoga No. 92152, 2009-Ohio-5691, ¶ 24, citing App.R. 4(B)(2). Motions for prejudgment interest and attorney fees are among the postjudgment motions that toll the 30-day window for filing. *See* App.R. 4(B)(2)(e)-(f); *Zhong* at ¶ 20 ("A judgment is not final if a motion for prejudgment interest remains pending."), citing *Miller v. First Internatl. Fid. & Trust Bldg., Ltd.*, 113 Ohio St.3d 474, 2007-Ohio-2457, 866 N.E.2d 1059, ¶ 11. If either or both of these motions is filed, "then the time for filing a notice of appeal from the judgment or final order in question begins to run as to all parties when the trial court *enters an order* resolving the last of these post-judgment filings." (Emphasis added.) App.R. 4(B)(2). The necessity of an order from the trial court provides certainty in the timeline for filing, and prevents any gamesmanship by a party attempting to manipulate the filing deadline (or at least create uncertainty) through strategic filing or withdrawal of a postjudgment motion.

{¶5} Here, the trial court did not issue an order resolving the Nichols' motion for prejudgment interest and attorney fees before Dr. Durrani and CAST filed their notice of appeal. Thus, the time for filing never began to run, and the notice of appeal is premature.

{¶6} Under App.R. 4(B), "[i]f a party files a notice of appeal from an otherwise final judgment," but before a motion for prejudgment interest or attorney fees is resolved, "then the court of appeals, upon suggestion of any of the parties, shall remand the matter to the trial court to resolve the post-judgment filings in question and shall stay appellate proceedings until the trial court has done so." But the parties have not suggested a remand here, and our review of the record reveals an additional problem with the underlying order entering judgment in favor of the Nichols. When the trial court overruled Dr. Durrani and CAST's motion for judgment notwithstanding the verdict, a new trial, or remittitur, it acknowledged a need to modify the jury's damages award to comport with R.C. 2315.21(D)(2) and 2323.34(A)(3), stating that "[t]he jury award * * * must be reduced by this Court in its final entry." But the court's order entering judgment for the Nichols makes no mention of damages: it outlines neither the jury's original award nor the required modification. "[O]rders determining liability in the plaintiffs' or relators' favor and deferring the issue of damages are not final appealable orders under R.C. 2505.02 because they do not determine the action or prevent a judgment." *State ex rel. White v. Cuyahoga Metro. Hous. Auth.,* 79 Ohio St.3d 543, 546, 684 N.E.2d 72 (1997). Although an exception to this general rule exists for cases "where the computation of damages is mechanical and unlikely to produce a second appeal," the unresolved need for a modification to the jury's verdict renders the exception inapplicable here.

Id. We therefore hold that the order entering judgment in favor of the Nichols is not a final order, and dismiss the appeal on that basis.

{¶7} We encourage the trial court to expeditiously resolve the damages issue and enter an appropriate judgment—as well as to enter an order resolving the Nichols' postjudgment motion—so that a timely appeal may be perfected and the parties can receive appellate guidance and certainty.

Appeal dismissed.

CROUSE and **BOCK, JJ.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion.