[Cite as *Martin v. Turner & Son Bldg. Contr.*, 2010-Ohio-6253.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

PENNY MARTIN, et al.,	:	**MEMORANDUM OPINION**
Plaintiffs-Appellees,	:	**CASE NO. 2010-L-137**
- vs -	:	
TURNER & SON BUILDING CONTRACTOR, et al.,	:	
Defendants,	:	
(ERIE INSURANCE EXCHANGE, Appellant).	:	

Civil Appeal from the Court of Common Pleas, Case No. 10 CV 00545.

Judgment: Appeal dismissed.

Thomas L. Brunn, Jr., The Brunn Law Firm Co., L.P.A., 208 Hoyt Block Building, 700 West St. Clair Avenue, Cleveland, OH 44113 (For Plaintiffs-Appellees).

Robert L. Tucker, Hanna, Campbell & Powell, L.L.P., 3737 Embassy Parkway, #100, P.O. Box 5521, Akron, OH 44334 (For Appellant).

MARY JANE TRAPP, P.J.

{¶1} This appeal was filed on November 12, 2010, by appellant, Erie Insurance Exchange, from a November 9, 2010 entry of the Lake County Court of Common Pleas. In that entry, the trial court denied appellant's motion to intervene in the underlying case for the limited purpose of submitting interrogatories to the jury.

{¶2} This court issued an entry on November 19, 2010, requesting that the parties

submit additional briefing to determine whether the denial of a motion to intervene constituted a final appealable order. Specifically, in that entry, we instructed the parties to address the applicability of the holding in *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607. Appellant filed a brief in support of jurisdiction with this court on November 23, 2010, claiming that its purpose is not to aid another case, but the purpose is to use the responses to the proposed jury interrogatories in supplemental proceedings in this case.

{¶3} According to Section 3(B)(2), Article IV of the Ohio Constitution, a judgment of a trial court can be immediately reviewed by an appellate court only if it constitutes a "final order" in the action. *Germ v. Fuerst*, 11th Dist. No. 2003-L-116, 2003-Ohio-6241, ¶3. If a lower court's order is not final, then an appellate court does not have jurisdiction to review the matter and the matter must be dismissed. *Gen. Acc. Ins. Co. v. Ins. of N. Am.* (1989), 44 Ohio St.3d 17, 20. For a judgment to be final and appealable, it must satisfy the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B).

{¶4} In *Gehm*, the insurance company initially brought a declaratory judgment action against its insured in regard to a potential claim under a commercial policy. While the first case was pending, the insurance company sought to intervene in a distinct proceeding between the insured and a former customer for whom the insured had performed certain work. The insurance company sought to intervene in order to submit jury interrogatories. After the *Gehm* trial court denied its motion to intervene, the insurance company appealed the decision to the Ninth Appellate District. That court dismissed the case for lack of a final appealable order, and then certified the matter to the Supreme Court of Ohio on the basis of a conflict with the decisions of other appellate districts, including our own.

{¶5} In concluding that the dismissal of the insurance company's appeal had been proper, the Supreme Court of Ohio, in *Gehm*, analyzed the final appealable order issue under two prongs of R.C. 2505.02(B). The court held that the denial of the motion to intervene was not a final order under R.C. 2505.02(B)(1) because, even though the ability to intervene is a substantial right, the denial did not prevent the entry of a final judgment in favor of the insurance company on the merits of the issue of coverage. As to this point, the Supreme Court noted that the insurance company would not be barred by the doctrine of collateral estoppel from litigating the actual merits in the separate declaratory judgment action. 112 Ohio St.3d at ¶31-32.

{¶6} The court also held that the appealed judgment was not "final" under R.C. 2505.02(B)(4) because the ability to intervene was not a provisional remedy. In this regard, the *Gehm* opinion emphasized that consideration of the motion to intervene could not be viewed as an ancillary proceeding because it would not aid in the final disposition of the attendant, underlying action, that is, the suit for damages arising from the construction of a building. Id. at ¶26-27.

{¶7} In attempting to distinguish the facts of the instant matter from those in *Gehm*, appellant has raised two arguments for consideration. Firstly, appellant asserts that the inability to obtain immediate review of the trial court's decision will "prevent" it from ever receiving a final "judgment" in its favor because it will never have an opportunity to question the jury in the pending case as to the specific reasons for its verdict. Appellant submits that the present parties to the litigation do not have any incentive to submit interrogatories that will be helpful in determining the extent of insurance coverage, if any.

{¶8} As to this point, this court would indicate that, in regard to the ability to submit interrogatories to the jury, there is no genuine factual distinction between the insurance

company in the *Gehm* matter and appellant. Given this, it must be assumed that, under the *Gehm* analysis, the lack of the opportunity to submit interrogatories was not a controlling factor in the Supreme Court's decision.

{¶9} We note that the Supreme Court of Ohio has recently reaffirmed this analysis in *State ex rel. Sawicki v. Court of Common Pleas*, 121 Ohio St.3d 507, 2009-Ohio-1523. Citing its decision in *VIL Laser Sys., L.L.C. v. Shiloh Industries, Inc.*, 119 Ohio St.3d 354, 2008-Ohio-3920, the court explained that "'[f]or an order to determine an action it must dispose of the merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court.'" *Sawicki* at ¶16. The denial of the motion to intervene in this case does neither.

{¶10} Under its second argument, appellant contends that the "provisional remedy" discussion in the *Gehm* opinion would not apply to this matter because it does not intend to pursue a separate declaratory judgment case. According to appellant, this aspect of the *Gehm* holding, i.e., the court's determination that the motion to intervene was not a provisional remedy, was predicated solely on the fact that the insurance company sought to intervene solely for the purpose of creating a record for another action. Appellant argues that a separate action will not be necessary in the present situation because any coverage dispute would be litigated through a supplemental proceeding in the underlying case.

{¶11} In its judgment denying the motion to intervene, the trial court indicated that intervention had been sought "on a limited basis in order to submit jury interrogatories." Thus, the materials before this court simply do not support appellant's contention that it sought to fully join the case and litigate new issues which had not already been asserted by the existing parties. To this extent, appellant has again failed to show any distinction between the facts in *Gehm* and this case.

{¶12} Moreover, appellant raises a distinction without a difference. It claims that its purpose is not to aid another case (as none is pending), but the purpose is to use the answers to the proposed jury interrogatories in supplemental proceedings in *this* case (presumably under R.C. 3929.06). Although this argument is appealing it provides no relief. While a supplemental proceeding is filed under the same case number as the original complaint by the plaintiff against its insured, it remains a separate action *that is filed by the plaintiff-judgment creditor not the carrier*, and, in fact, there are two conditions precedent to the filing of a supplemental proceeding-a final judgment and a lapse of thirty days since that judgment without payment of the judgment. R.C. 3929.06(B). These conditions have not been met at this point in time, and may never be met depending on the outcome of the trial.

{¶13} For the foregoing reasons, this court concludes that appellant has not properly invoked our jurisdiction by basing its present appeal upon a final appealable order. That is, if a final order has not been rendered, we would not have the authority to review the actual merits of the "intervention" decision.

{¶14} Accordingly, this appeal is hereby sua sponte dismissed for lack of a final appealable order.

{¶15} Appeal dismissed.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.