[Cite as *Jackson v. Proto Machine & Mfg., Inc.*, 2015-Ohio-1205.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

HARRY JACKSON III, et al.,	:	**MEMORANDUM OPINION**
Plaintiffs,	:	
		CASE NO. 2013-P-0078
- vs -	:	
PROTO MACHINE & MFG., INC., et al.,	:	
Defendant-Appellee,	:	
-vs-		
(MOTORIST MUTUAL INSURANCE COMPANY,		
Appellant).		

Civil Appeal from the Portage County Court of Common Pleas.
Case No. 2012 CV 01335.

Judgment: Appeal dismissed.

Alycia N. Broz, Vorys, Sater, Seymour & Pease LLP, 52 E. Gay Street, P.O. Box 1008, Columbus, OH 43214-1008; *F. Daniel Balmert* and *Thomas R. Crookes*, Vorys, Sater, Seymour & Pease LLP, 106 South Main Street, Suite 1100, Akron, OH 44308 (For Defendant-Appellee).

Jay Clinton Rice, *Joseph W. Pappalardo*, and *Colleen A. Mountcastle*, Gallagher, Sharp, Fulton & Norman, Sixth Floor, Bulkley Building, 1501 Euclid Avenue, Cleveland, OH 44115-2108 (For Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Motorists Mutual Insurance Company, appeals the judgment of the Portage County Court of Common Pleas denying its motion to intervene under

either Civ.R. 24(A) or (B). The instant appeal arises from a workplace intentional tort action, pursuant to R.C. 2745.01, filed by Harry Jackson III against Proto Machine & Mfg., Inc. (appellee herein) and the Ohio Bureau of Workers' Compensation. Appellant sought to intervene below in order to determine its obligation to defend and indemnify appellee, its insured. For the reasons that follow, we dismiss the appeal for lack of a final, appealable order.

{¶2} On November 11, 2010, Jackson was severely injured while working in appellee's machine and manufacturing shop. Jackson filed his complaint on November 13, 2012. In his complaint, Jackson alleges that the purposeful removal of a safety switch caused his injury.

{¶3} On April 11, 2013, appellant filed a motion to intervene, which was opposed by appellee. The trial court denied appellant's motion to intervene on August 15, 2013, stating that "[appellant] in seeking to intervene contends that [appellee] is not owed a defense by [appellant] nor indemnification for damages." The trial court stated that had appellant sought to intervene for more limited purposes, such as to ask for clarification of the indemnification issue, the court "may rule differently." Finally, the trial court stated that allowing appellant to intervene in order to deny coverage would be "extraordinarily burdensome and unnecessary."

{¶4} Appellant timely appealed the denial of its motion to intervene. Subsequently, this court sua sponte ordered briefing on the issue of whether we have jurisdiction to consider the appeal in light of the Ohio Supreme Court's decision in *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607. Specifically, we noted there are claims still pending in the trial court that do not include appellant, but do

include appellee. Further, the trial court's August 15, 2013 judgment entry does not include Civ.R. 54(B) language. Both parties submitted briefing in support of jurisdiction. We find, however, that the trial court's denial of intervention is not final and appealable.

{¶5} Pursuant to Article IV, Section 3(B)(2) of the Ohio Constitution, courts of appeals have jurisdiction only to "affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district." "It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20 (1989).

{¶6} The term "final order" is defined within R.C. 2505.02(B) and includes seven categories of final orders. Only the first category is relevant to the instant matter: "An order that affects a substantial right in an action that in effect determines the action and prevents a judgment." R.C. 2505.02(B)(1). A "substantial right" is "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1).

{¶7} In support of its argument in favor of jurisdiction, appellant relies on the Ohio Supreme Court's 1989 decision in *Howell v. Richardson*, which held: "Where a determination is made in an initial action against a tortfeasor relative to his culpable mental state, collateral estoppel precludes relitigation of the determination in a subsequent proceeding brought against the tortfeasor's insurer pursuant to R.C. 3929.06." 45 Ohio St.3d 365 (1989), paragraph one of the syllabus. Appellant argues that, if it is not permitted to intervene, it will be precluded from relitigating the issue of the mental state of its insured in a subsequent proceeding regarding appellant's duty to

indemnify. In other words, appellant asserts the trial court's decision as to appellee's "culpable mental state" will be binding on appellant under the doctrine of collateral estoppel.

{¶8} We do not agree. In 2007, the Ohio Supreme Court issued its decision in *Gehm*, which directly addressed its holding in *Howell*. The Supreme Court held: "When a party has sought and been denied intervention, collateral estoppel will not prohibit future litigation of similar issues. *Howell v. Richardson* (1989), 45 Ohio St.3d 365, 544 N.E.2d 878, construed." *Gehm*, *supra*, at paragraph two of the syllabus.

{¶9} In *Gehm*, the insurer also argued that the decision in *Howell* would collaterally estop any future litigation in its declaratory judgment action regarding the mental state of its insured. The Supreme Court responded that the insurer "misconstrues *Howell*, which imposed collateral estoppel against an insurer when it 'could have intervened in the prior proceeding.'" *Id.* at ¶31, quoting *Howell*, *supra*, at 367. "When a party has sought and been denied intervention, collateral estoppel will *not* prohibit future litigation of similar issues. As [the insurer] has sought and been denied intervention here, it will *not* be estopped from litigating its claims in another case." *Id.* (emphasis added).

{¶10} The *Gehm* Court went on to state that "there is no order that has determined an action with respect to [the insurer], and the denial of the motion to intervene prevented no judgment." *Id*. at ¶32. "[T]he denial of a motion to intervene, when the purpose for which intervention was sought may be litigated in another action, does not affect a substantial right under R.C. 2505.02(B)(1) that determines the action and prevents the judgment." *Id.* at ¶37; *see also Geauga Sav. Bank v. Rickard*, 11th

Dist. Ashtabula No. 2012-A-0052, 2013-Ohio-3863, ¶8-10 (applying *Gehm*). The Supreme Court ultimately held the denial of intervention was not a final, appealable order. *Gehm*, *supra*, at ¶37.

{¶11} Appellant argues that *Gehm* should not apply to this case because in the event of a jury verdict in plaintiff's favor, a denial of intervention will prevent appellant from identifying the basis for the verdict. This argument was previously addressed and rejected by this court in *Martin v. Turner & Son Bldg. Contr.*, 11th Dist. Lake No. 2010-L-137, 2010-Ohio-6253. The appellant in *Martin* also attempted to distinguish the facts of that case from those in *Gehm* by asserting "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." *Id.* at ¶7. This court responded:

> 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.
>
> 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, 905 N.E.2d 1192. Citing its decision in *VIL Laser Sys., L.L.C. v. Shiloh Industries, Inc.*, 119 Ohio St.3d 354, 2008 Ohio 3920, 894 N.E.2d 303, 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.

{¶12} Appellant also attempts to distinguish the facts of this case from *Gehm* by relying on the Ohio Supreme Court's decision in *Southside Community Dev. Corp. v.*

Levin Tax Commr., 116 Ohio St.3d 1209, 2007-Ohio-6665. In *Southside*, the Supreme Court reversed the Board of Tax Appeal's denial of Mahoning County's motion to intervene in a case seeking tax exemption for a property. *Id.* at ¶3. In reversing the Board of Tax Appeals decision, the Supreme Court held that Mahoning County, as owner of the property, would have no recourse to vindicate its interest in the property if intervention was denied. *Id.* at ¶7. The Supreme Court went on to state that "a later appeal could protect those interests only by ordering a complete retrial of the case." *Id.*

{¶13} Appellant's reliance on this case is also misplaced. The facts underlying the dispute in *Southside* are unique, in that it dealt with a specific Ohio Revised Code section that would leave Mahoning County without any recourse. Indeed, the Supreme Court distinguished the facts in *Southside* from those in *Gehm*:

> In *Gehm*, we specifically noted that denial of a motion to intervene is not final and appealable 'when the purpose for which intervention was sought may be litigated in another action.' *Gehm*, ¶37. By contrast, in this case the pending application for exemption constitutes the sole means provided by statute for securing the right to exempt status in prior tax years. Even if Mahoning County could file an application and qualify for exemption for tax year 2007, it could not obtain remission of taxes owed for prior years when it was not the owner of the property. *See* R.C. 5713.08(B) * * *.

Id. at ¶8. We hold that *Southside* is distinguishable from the case sub judice for the same reasons.

{¶14} For the foregoing reasons, we find that the denial of intervention in this case is not a final, appealable order. Pursuant to the Ohio Supreme Court's ruling in *Gehm*, appellant will not be precluded from litigating appellee's "culpable mental state" in a separate declaratory judgment action.[1]

1. We note the issue of appellee's "culpable mental state" may be determined by the Ohio Supreme Court's disposition in the case of *Hoyle v. DTJ Enter., Inc.*, Sup. Ct. No. 2013-1405, 2015-Ohio-843.

{¶15} Appeal dismissed.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.