[Cite as *Knox Cty. Commrs. v. Knox Cty. Engineer*, 2010-Ohio-4099.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
KNOX COUNTY COMMISSIONERS	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiffs-Appellees	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 09 CA 00041
	:	
	:	
KNOX COUNTY ENGINEER	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Civil Appeal from Knox County Court of Common Pleas Case No. 08 OT 020109
JUDGMENT:	Dismissed
DATE OF JUDGMENT ENTRY:	August 31, 2010

APPEARANCES:

For Plaintiffs-Appellees

GERHARDT A. GOSNELL, III
Chester Willcox & Saxbe, LLP
65 E. State Street, Suite 1000
Columbus, Ohio 43215

For Defendant-Appellant

LUTHER L. LIGGETT, JR.
ANTHONY M. SHARETT
Bricker & Eckler, LLP
100 South Third Street
Columbus, Ohio 43215-4291

Edwards, P.J.

{¶1} Appellant, James L. Henry, Knox County Engineer, appeals a declaratory judgment of the Knox County Common Pleas Court in favor of appellees Allen Stockberger, Theresa Bemiller and Robert Wise, Knox County Commissioners.

STATEMENT OF FACTS AND CASE

{¶2} A dispute arose between appellant and appellees regarding appellant's refusal to pay his allotted portion of the annual cost of the County Risk Sharing Authority ("CORSA"), a risk sharing pool created by R.C. 2744.08, related to the coverage period of May 1, 2007, through April 30, 2008. The parties also disputed appellant's refusal to reimburse appellees for a $2500 deductible which arose from repairs to a county owned vehicle damaged plowing snow from county roads.

{¶3} The highway department which appellant oversees is funded, in part, by funds derived from the registration, operation and use of vehicles and fuel ("MVGT"). The Supreme Court of Ohio has held that the Ohio Constitution restricts the use of MVGT funds to highway purposes or purposes directly connected thereto. Appellant maintained that payment of CORSA premiums is not a highway purposes or a purpose directly connected thereto. Appellees filed the instant action seeking a declaratory judgment that CORSA premiums expenditures are a highway purpose or a purpose directly connected to a highway purpose, that the use of MVGT funds for CORSA premiums and to pay the deductible for the damaged vehicle is constitutional, and the charges billed by appellees to appellant for CORSA premiums are reasonable. Appellees also sought a mandatory injunction ordering appellant to pay the invoice for CORSA premiums in the amount of $19,789.00 and the invoice for the deductible in the

amount of $2500 from MVGT funds under appellant's control, and ordering appellant to pay reasonable charges billed by appellees for appellant's share of CORSA premiums in future years, based on the allocation method used to calculate the 2007-2008 premiums.

{¶4} The case proceeded to bench trial in the Knox County Common Pleas Court. Following trial, the court issued the following judgment:

{¶5} "This matter came on for hearing on August 24, 2009, upon the complaint of the Plaintiffs filed February 13, 2008, requesting a declaratory judgment.

{¶6} "Pursuant to the Findings of Fact (filed by separate entry), it is

{¶7} "**ORDERED** Plaintiff's request for a declaratory judgment is granted and MVGT Funds can be used to pay a portion of the annual CORSA premium and on deductibles and the Defendant is authorized to make payment of the two invoices at issue. Costs to Defendant."

{¶8} Judgment Entry, November 19, 2009.

{¶9} Appellant assigns two errors on appeal:

{¶10} "II. THE TRIAL COURT ERRED BY FAILING TO USE AN ABUSE OF DISCRETION STANDARD AS THE COUNTY ENGINEER ENJOYS DISCRETION TO DETERMINE WHETHER AN EXPENDITURE IS FOR A 'HIGHWAY PURPOSE.'

{¶11} "II. THE TRIAL COURT ERRED BY NOT DISMISSING THIS CASE ON ITS FACE, AS A MATTER OF LAW."

{¶12} We first address the issue of whether the judgment appealed from is a final, appealable order. The court has not disposed of appellees' demand for a mandatory injunction. The judgment on its face only grants declaratory judgment.

Further, the language used by the court is permissive in nature rather than mandatory, and does not order appellant to pay the invoices and/or the deductible. The judgment merely declares that the MVGT funds can be used to pay the invoices, which is the relief sought by appellees in their request for declaratory judgment. A declaratory judgment must be accompanied with injunctive relief in the form of a mandatory injunction in order to successfully compel performance. *State ex rel. General Motors Corp. v. Industrial Comm*., 117 Ohio St.3d 480, 884 N.E.2d 1075, 2008-Ohio-1593, ¶ 10, citing *State ex rel. Fenske v. McGovern* (1984), 11 Ohio St.3d 129, 131, 464 N.E.2d 525. The trial court did not rule on appellees' request for injunctive relief in the judgment entry.

{¶13} When determining whether a judgment or order is final and appealable, an appellate court engages in a two-step analysis. First, we must determine if the order is final within the requirements of R.C. 2505.02. Second, if the order satisfies the requirements of R.C. 2505.02, we must determine whether Civ.R. 54(B) applies and, if so, whether the order contains a certification that there is no just reason for delay. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 21.

{¶14} To constitute a final order, an order must fit into one of the categories in R.C. 2505.02(B). Pursuant to R.C. 2505.02(B)(2), "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is * * * [a]n order that affects a substantial right made in a special proceeding." The Supreme Court of Ohio has held that a declaratory judgment action is a special proceeding pursuant to R.C. 2505.02 and that an order entered in a declaratory judgment action that affects a substantial right is a final order under R.C. 2505.02(B)(2). *Gen. Acc. Ins. Co.* at 22. 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). It involves the notion of a right that will be protected by law. *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94; *Gen. Acc. Ins. Co.* at 21. In *Gen. Acc. Ins.* Co., at 22, the court concluded that an insurer's duty to defend claims against its insured involves a substantial right to both the insured and the insurer. Thus, the court determined that the trial court's order in that case, declaring that an insurer owed no duty to defend its insured with respect to a third-party's claims against the insured, constituted a final order under R.C. 2505.02(B)(2). While continuing to recognize that a declaratory judgment is a special proceeding, the court later determined that an order that declares that an insured is entitled to coverage but does not determine damages does not affect a substantial right for purposes of R.C. 2505.02(B)(2*). Walburn v. Dunlap*, 121 Ohio St.3d 373, 904 N.E.2d 863, 2009-Ohio-1221, ¶27.

{¶15} The Supreme Court of Ohio continued its analysis in *Gen. Acc. Ins.* Co. by considering the applicability of Civ.R. 54(B). Civ.R. 54(B) was created to strike a balance between “the policy against piecemeal appeals [and] the possible injustice sometimes created by the delay of appeals.” *Alexander v. Buckeye Pipe Line Co.* (1977), 49 Ohio St.2d 158, 160. In multiple-claim or multiple-party actions, if the court enters a final judgment as to some, but not all, of the claims and/or parties, the judgment is a final, appealable order only upon the express determination that there is no just reason for delay. *Gen. Acc. Ins. Co.* at 22; Civ. R. 54(B). In *Gen. Acc. Ins.* Co., where the trial court's ruling declared that an insurance company owed no duty to defend, but left certain other claims unresolved, the Supreme Court concluded that

Civ.R. 54(B) applied because the case involved multiple claims and multiple parties. The court determined, however, that the trial court complied with Civ.R. 54(B) by expressly determining that there was no just reason for delay. Accordingly, the Supreme Court held that the trial court's judgment was a final, appealable order.

{¶16} In the instant case, the judgment does not comply with Civ. R. 54(B). See, e.g. *Dickens v. Ogdin* (Nov. 24, 1993), Meigs App. No. 498, 1993 WL 491327, unreported (declaratory judgment not final where judgment does not contain Civ. R. 54(B) language and claims remain pending in the trial court); *All State Ins. Co. v. Soto* (Nov. 30, 2000), Cuyahoga App. Nos. 78114, 78115, 2000 WL 1754000 (declaratory judgment not final where judgment does not contain Civ. R. 54(B) language and underlying tort action with which it was consolidated remains pending); *Braelinn Green Condominuim Assoc. v. Italia Homes*, Franklin App. No. 09AP-1144, 2010-Ohio-2371 (dismissal of declaratory judgment claim not final where judgment does not contain Civ. R. 54(B) language and other claims remain pending); *Bath Twp. V. Firestone* (September 14, 1998), Summit App. No. 19159, 1998 WL 713215(declaratory judgment not final where judgment does not contain Civ. R. 54(B) language and claims for specific performance and a permanent injunction remain pending).

{¶17} Further, even if the judgment contained Civ. R. 54(B) language, it is not clear that the judgment affects a substantial right under R.C. 2505.02(B)(2). As cited earlier, in *Walburn*, supra, the Ohio Supreme Court determined that an order declaring that an insured is entitled to coverage, but not determining damages, does not affect a substantial right 112 Ohio St.3d 373 at ¶ 27. Similarly, in the instant case the court issued a declaratory judgment regarding the CORSA premiums and the deductible, but

it did not issue an injunction ordering MVGT funds to be used to pay the premiums and deductible. Without ruling on the request for injunctive relief, there is no judgment which can be enforced to require appellant to pay in accordance with appellees' demand. The judgment appealed from is not a final, appealable order and this Court does not have jurisdiction over the appeal.

{¶18} The appeal is dismissed for want of jurisdiction.

By: Edwards, P.J.

Hoffman, J. and

Delaney, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES

JAE/d0603

[Cite as *Knox Cty. Commrs. v. Knox Cty. Engineer*, 2010-Ohio-4099.]

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

KNOX COUNTY COMMISSIONERS	:	
Plaintiffs-Appellees	:	
-vs-	:	JUDGMENT ENTRY
KNOX COUNTY ENGINEER	:	
Defendant-Appellant	:	CASE NO. 09 CA 00041

For the reasons stated in our accompanying Memorandum-Opinion on file, the appeal of the Knox County Court of Common Pleas is dismissed. Costs assessed to appellant.

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES