[Cite as *Fagan v. Boggs*, 2009-Ohio-6601.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

LINDA FAGAN, et al.,	:	
	:	
Plaintiffs-Appellees,	:	Case No. 08CA45
	:	
vs.	:	**Released: December 8, 2009**
	:	
ROBERT J. BOGGS, DIRECTOR OHIO DEPARTMENT of AGRICULTURE,	:	DECISION AND JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Richard Cordray, Ohio Attorney General, and James R. Patterson, Ohio Assistant Attorney General, Reynoldsburg, Ohio, for the Appellant.

David G. Cox, Columbus, Ohio, for the Appellees.

McFarland, J.:

{¶1} Appellant, Robert J. Boggs, Director, Ohio Department of Agriculture, appeals the decision of the Washington County Court of Common Pleas, which issued a declaratory judgment and injunction in favor of Appellees, Linda Fagan and Donna Betts, with regard to a withdrawal from distribution order issued in connection with Appellees' manufacture and distribution of pet food. Appellant also appeals the trial court's award of attorneys fees to Appellees. On appeal, Appellant contends that the trial

court 1) erred and abused its discretion in holding that Appellant denied Appellees due process and the equal protection of the laws in applying R.C. 923.52; 2) erred and abused its discretion in awarding Appellees attorney fees; 3) erred and abused its discretion in issuing an injunction against future enforcement by Appellant of Ohio's feed label laws against Appellees' feed product labels; and 4) erred and abused its discretion in holding that Appellant engaged in illegal rulemaking. Because we conclude that the order and decision appealed from is not a final, appealable order, Appellant's appeal is dismissed.

Facts

{¶2} Appellees, Linda Fagan and Donna Betts, are manufacturers of pet food, the primary ingredient of which is milk, or raw milk, and have been in this business since 2001 and 2002, respectively. Appellees were previously issued commercial feed registrations by the Ohio Department of Agriculture, "ODA," and sold their products at local farmers markets. On February 14, 2006, Appellees were issued "Stop Sale/Withdraw from Distribution" orders from the Ohio Department of Agriculture, pursuant to R.C. 923.52. The basis for the orders, according to the language contained in the orders themselves, was that Appellees were "[s]elling pet food products made from milk. Milk is not recognized as a feed ingredient under

the definition of AAFCO (Association of American Feed Control Officials)." Appellees complied with the orders. Having no feed on hand at the time the orders were issued[1], Appellees ceased further production of their pet food.

{¶3} Subsequently, by letters dated April 24, 2006, the ODA notified Appellees of their intent to revoke Appellees' commercial feed registrations pursuant to R.C. 923.42. In the letters, the ODA also notified Appellees of their right to administrative hearings under R.C. 119. Both Appellees obtained counsel in order to prepare for their requested hearings, which were scheduled on July 12, 2006. However, having apparently determined that Appellees were no longer marketing their commercial feed, the ODA withrew its proposed revocations and the scheduled hearings were cancelled. At that point, the situation essentially came to a standstill, with Appellees having never commenced their production and the ODA having never pursued the revocation of Appellees' commercial feed registrations.

{¶4} Then, on July 31, 2006, Appellees filed a complaint for declaratory judgment and injunctive and other relief against the ODA. In their complaint, Appellees alleged that 1) R.C. 923.52 is unconstitutional on its face and as applied to them; 2) neither the director of the ODA nor his staff

[1] This is true, with the exception of Appellee Fagan, who did have butter on hand. Upon issuance of the order, the butter was released to Appellee Fagan for her own personal use.

can withdraw a proposed action under R.C. 119 once an adjudication hearing is requested; and 3) that a person who requests an adjudication hearing once an agency issues a proposed action becomes a prevailing party if the agency chooses to withdraw the proposed action prior to the hearing. Further, as part of their prayer for relief, Appellees specifically requested that the court declare them to be "prevailing parties" under R.C. 119.092 and award them attorney's fees and costs pursuant to that statute, as well as R.C. 2335.39 and 2721.11.[2] The ODA responded by filing an answer on August 31, 2006 and the matter proceeded with discovery.

{¶5} On September 24, 2007, Appellees filed an amended complaint for declaratory judgment and injunctive and other relief. The ODA filed another answer on October 9, 2007, followed by a motion for summary judgment on November 16, 2007, which was ultimately denied by the trial court. The matter proceeded to a trial on the merits to the court on August 25, 2008. After hearing the evidence presented by both parties, the trial court ordered closing arguments, as well as findings of fact and conclusions of law to be submitted by the parties. The trial court then adopted, almost verbatim, Appellees proposed findings of fact and conclusions of law, and issued its order and decision on October 29, 2008.

[2] R.C. 2721.11 provides that a court may award court costs in any action or proceeding in which declaratory relief is sought.

{¶6} In its order and decision, the trial court found that R.C. 923.52 was constitutional on its face, but was unconstitutional as applied by the ODA to Appellees. As a result, the trial court found Appellees' complaint for injunctive relief to be well taken and vacated the ODA's stop orders. The trial court further found that Appellees' pet food labels complied with ODA regulations and that because Appellees had not been afforded a hearing on the validity of their labels, the court deemed the labels to be in compliance with Ohio law and enjoined the ODA from further action to prohibit Appellees' use of their commercial feed licenses for the manufacture of pet food, on the basis that their labels did not comply with Ohio law. Further, the trial court determined Appellees to be "prevailing parties" under Ohio law and ordered that they recover all their requested attorney fees. Additionally, the trial court reserved "the right to impose additional fees upon the application of [Appellees] for fees and costs incurred during the hearing and the post-hearing period. Finally, the court granted Appellees' motion to dismiss counts two and three of their amended complaint. The trial court's order and decision did not contain language indicating that it was a final, appealable order.

{¶7} Subsequently, and as essentially invited to do by the trial court's order, Appellees filed a post-trial motion for attorney's fees and costs on

November 4, 2008. In their motion, Appellees requested additional fees be awarded to them for the period from June of 2008 to the date the motion was filed. Appellant, ODA, filed a memorandum contra to the motion on November 18, 2008, to which Appellees filed a reply on November 19, 2008. All of these pleadings remained pending at the time ODA filed its notice of appeal on November 26, 2008, and have yet to be ruled upon by the trial court. On appeal, Appellant, ODA, assigns the following errors for our review.

Assignments of Error

"I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN HOLDING THAT APPELLANT DENIED APPELLEES DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS IN APPLYING R.C. 923.52.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN AWARDING APPELLEES ATTORNEY FEES.

III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ISSUING AN INJUNCTION AGAINST FUTURE ENFORCEMENT BY APPELLANT OF OHIO'S FEED LABEL LAWS AGAINST APPELLEES' FEED PRODUCT LABELS.

IV. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN HOLDING THAT APPELLANT ENGAGED IN ILLEGAL RULE MAKING."

Legal Analysis

{¶8} Initially, we address the threshold issue of whether the judgment entry appealed is a final, appealable order. Appellate courts have no "jurisdiction to review an order that is not final and appealable." *Oakley v. Citizens Bank of Logan*, Athens App. No. 04CA25, 2004-Ohio-6824, ¶ 6, citing Section 3(B)(2), Article IV of the Ohio Constitution; *General Acc. Ins. Co. v. Ins. Co. of N. America* (1989), 44 Ohio St.3d 17, 540 N.E.2d 266; *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 540 N.E.2d 1381. Further, "[a] trial court's finding that its judgment is a final appealable order is not binding upon this court." *In re Nichols*, Washington App. No. 03CA41, 2004-Ohio-2026, ¶ 6, citing *Ft. Frye Teachers Assn. v. Ft. Frye Local School Dist. Bd. of Edn.* (1993), 87 Ohio App.3d 840, 843, fn. 4, 623 N.E.2d 232, citing *Pickens v. Pickens* (Aug. 25, 1992), Meigs App. No. 459, 1992 WL 209498. This court has "no choice but to sua sponte dismiss an appeal that is not from a final appealable order." Id. at ¶ 6, citing *Whitaker-Merrell v. Geupel Constr. Co.* (1972), 29 Ohio St.2d 184, 280 N.E.2d 922.

{¶9} "An 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 in an action that in effect determines the action and prevents a judgment" or "[a]n order that affects a substantial right made in a

special proceeding[.]" R.C. 2505.02(B). "A final order * * * is one disposing of the whole case or some separate and distinct branch thereof." *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306, 272 N.E.2d 127.

{¶10} An order adjudicating "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." *Noble* at syllabus. However, when a trial court does not resolve an entire claim, regardless of whether the order meets the requirements of Civ.R. 54(B), the order is not final and appealable. See *Jackson v. Scioto Downs, Inc.* (1992), 80 Ohio App.3d 756, 758, 610 N.E.2d 613. Further, a judgment contemplating further action by the court is not a final appealable order. *Nationwide Assur. Inc, v. Thompson*, Scioto App. No. 04CA2960, 2005-Ohio-2339, ¶ 8, citing *Bell v. Horton*, 142 Ohio App.3d 694, 696, 2001-Ohio-2593, 756 N.E.2d 1241,.

{¶11} As this court previously noted in *Jones v. Burgess*, Pickaway App. No. 07CA37, 2008-Ohio-6698 at ¶11, the Supreme Court of Ohio recently held that "[w]hen attorney fees are requested in the original pleadings, an order that does not dispose of the attorney-fee claim * * * is not a final, appealable order." *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, paragraph two of the syllabus. This court has continuously held that "[a] determination of liability without a determination of damages is not a final appealable order because damages are part of a claim for relief, rather than a separate claim in and of themselves." *Shelton v. Eagles Foe Aerie 2232* (Feb. 15, 2000), Adams App. No. 99CA678, 2000 WL 203857, citing *Horner v. Toledo Hospital* (1993), 94 Ohio App.3d 282, 640 N.E.2d 857.

{¶12} Where a prayer for relief requests a particular type of damages and the court fails to specifically adjudicate that aspect of the damages requested, no final appealable order exists. See *Britton v. Gibbs Assoc.*, Highland App. No. 06CA34, 2008-Ohio-210, ¶ 12; *In re Sites*, Lawrence App. No. 05CA39, 2006-Ohio-3787, ¶ 16; see, also, *Miller v. First International Fidelity & Trust Building, Ltd.*, 165 Ohio App.3d 281, 2006-Ohio-187, 846 N.E.2d 87, ¶ 36. In *Jones v. McAlarney Pools, Spas & Billiards, Inc.*, Washington App. No. 07CA34, 2008-Ohio-1365, ¶ 11, this Court interpreted the syllabus in *Vaughn* "in light of its underlying facts" and applied the "broad syllabus language" only to those instances where attorney fees are requested pursuant to a "specific statutory or rule authority[.]" See, also, *Jones v. Burgess* at ¶12. Absent an attorney fee request under specific authority, appellate courts should "treat the fee

request as having been overruled sub silento" when not specifically disposed of in the trial court's order. Id. Further, we have historically dismissed appeals for lack of a final, appealable order when a trial court specifically 1) raises the attorney issue and defers its adjudication, or 2) awards attorney fees and defers the determination of the amount of fees. *Jones v. McAlarney* at ¶10 (citations omitted).

{¶13} Here, Appellees prayed for attorney fees in their amended complaint, specifically arguing that they were entitled to such as "prevailing parties" under R.C. 119.092 and R.C. 2335.39, which both provide for attorney fees to be paid to certain prevailing parties. Although the trial court's order and decision determined Appellees were prevailing parties and awarded them the fees that had accrued as of the time of the hearing, the court expressly stated in its entry that it was reserving "the right to impose additional fees upon the application of these Plaintiffs for fees and costs incurred during the hearing and the post-hearing period. The record reveals that subsequent to the hearing, on November 4, 2008, Appellees filed a motion for attorney fees and costs and memorandum in support, requesting additional fees be awarded for the period of June 2008 to the present. Appellants filed a memorandum opposing the motion on November 17, 2008, which prompted Appellees to file a reply memorandum on November

19, 2008, all of which were pending at the time the notice of appeal of this matter was filed with this Court on November 26, 2008, and which remain pending at this time.

{¶14} Here the trial court's order specifically reserved the right to award further fees subsequent to its decision. As such, the judgment clearly contemplated further action by the court and therefore is not a final appealable order. *Nationwide Assur. Inc, v. Thompson* at ¶ 8, citing *Bell v. Horton* at 696. Accordingly, we dismiss this appeal because we lack of jurisdiction to consider it.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED and that the Appellees recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Kline, P.J. and Harsha, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.