[Cite as *Pesta v. Parma*, 2009-Ohio-3060.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92363

RALPH A. PESTA, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ANTHONY J. PESTA

PLAINTIFF-APPELLANT

vs.

CITY OF PARMA, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-566756

BEFORE: Celebrezze, J., Rocco, P.J., and Dyke, J.

RELEASED: June 25, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Ralph A. Pesta ("Pesta"), on behalf of the estate of Anthony J. Pesta, brings this appeal of the trial court's grant of summary judgment in favor of appellees, City of Parma ("the City") and Aetna Construction Ltd. ("Aetna"). After a review of the record, we dismiss this appeal for lack of jurisdiction.

{¶ 2} On July 1, 2005, Pesta filed a complaint against appellees for negligence, survivorship, and declaratory judgment.[1] (Case No. CV-566756.) On October 25, 2006, the trial court granted summary judgment in favor of Aetna on the basis that Aetna did not own the property where Anthony died. On June 25, 2007, the trial court granted summary judgment in favor of the City, holding that the City was immune from civil liability under R.C. Chapter 2744.

{¶ 3} Pesta appealed, and this court dismissed the appeal for lack of a final appealable order. See *Pesta v. City of Parma*, Cuyahoga App. No 90169, 2008-Ohio-2354 ("*Pesta I*"). This court found that the trial court had not disposed of the declaratory judgment claim challenging the constitutionality of R.C. 2744. The City argued that the trial court lacked jurisdiction to hear the claim because Pesta did not

[1]On July 23, 2003, Anthony Pesta died as a result of injuries he suffered falling into a steep ravine on property in Parma, Ohio. In the complaint, Count 1 alleged Parma was negligent in the maintenance of its property, resulting in Anthony Pesta's death; Count 2 alleged a survivorship claim based on any pain and suffering Anthony experienced prior to his death; Count 3 sought a declaratory judgment that R.C. 2744 is unconstitutional; and Count 4 alleged that if Aetna Construction owned the property where Anthony fell to his death, Aetna was liable for negligence.

satisfy the notice requirement under R.C. 2721.12(A).[2] In dismissing the appeal, this court held "the docket reflects both that the attorney general was served and entered a notice of appearance and reservation of rights. Accordingly, the trial court had jurisdiction to consider Pesta's claim for declaratory judgment that R.C. Chapter 2744 is unconstitutional ***. Because the trial court did not dispose of Pesta's declaratory judgment claim, and made no finding that there 'is no just reason for delay,' we lack a final appealable order and thus do not have jurisdiction to hear the appeal."

{¶ 4} Upon remand, the trial court entered the following judgment: "*** The sole issue before this court involves count three of the complaint which seeks declaratory judgment on the governmental immunity statute. *** Count three of the complaint is not properly before the court because plaintiff failed to timely perfect service on that issue. *** Since the plaintiff failed to perfect service on the Ohio Attorney General within one year of filing, the declaratory judgment action did not commence. Therefore, the question of the constitutionality of the statute was not properly before the trial court. As such, this court's earlier ruling on defendant's motion for summary judgment is a final appealable order. Final. No just cause for delay." See Judgment Entry, Oct. 7, 2008.

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[2]R.C. 2721.12 states in relevant part: "*** [W]hen declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding. *** [I]f any statute or the ordinance or franchise is alleged to be unconstitutional, the attorney general also shall be served with a copy of the complaint in the action or proceeding and shall be heard ***."

{¶ 5} On November 4, 2008, Pesta filed the instant appeal. In addition to assigning as error the trial court's grant of summary judgment in favor of appellees, Pesta also raises the issue of whether the trial court's October 7, 2008 order is a final appealable order. Pesta argues that the law of the case prevents the trial court from ignoring this court's finding that the declaratory judgment claim must be resolved. Pesta's argument has merit.

{¶ 6} We find that because the trial court did not resolve the declaratory judgment action, as instructed by this court in *Pesta I*, its judgment is not a final appealable order pursuant to R.C. 2505.02, regardless of the fact that the trial court included Civ.R. 54(B) language stating there was no just reason for delay. Thus, we have no jurisdiction to review the underlying case.

{¶ 7} The Ohio Constitution limits an appellate court's jurisdiction to the review of final judgments of lower courts. Section 3(B)(2), Article IV. Accordingly, this court has jurisdiction to review only final and appealable orders. See *Harkai v. Scherba Indus.* (2000), 136 Ohio App.3d 211, 219, 736 N.E.2d 101. "For a judgment to be final and appealable, the requirements of R.C. 2505.02 and Civ.R. 54(B), if applicable, must be satisfied." *Konstand v. Barberton*, 9th Dist. No. 21651, 2003-Ohio-7187, at ¶4, citing *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88, 541 N.E.2d 64.

{¶ 8} "Under the law-of-the-case doctrine, the denial of jurisdiction over a discretionary appeal by this court settles the issue of law appealed." *Sheaffer v. Westfield Ins. Co.*, 110 Ohio St.3d 265, 2006-Ohio-4476, 853 N.E.2d 275, syllabus.

In *State ex rel. Bd. of State Teachers Ret. Sys. v. Davis*, 113 Ohio St.3d 410, 2007-Ohio-2205, 865 N.E.2d 1289, the Ohio Supreme Court held that "[t]he court of appeals' prior determination that [the trial court's] entry is not a final appealable order remained the law of the case for subsequent proceedings."

{¶ 9} In *Pesta I*, this court determined that the Ohio Attorney General had been properly served and had entered an appearance and a reservation of rights. The trial court cannot later decide on its own that, in fact, service was not proper, and the claim was not properly before it.

{¶ 10} Furthermore, just because the trial court included Civ.R. 54(B) language in its subsequent order does not automatically transform the judgment into a final appealable order. As the Ohio Supreme Court has held in the past, "the phrase 'no just reason for delay' is not a mystical incantation which transforms a nonfinal order into a final appealable order." *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 1993-Ohio-120, 617 N.E.2d 1136, citing *Chef Italiano Corp. v. Kent State Univ.*, supra.

{¶ 11} The court in *Portco, Inc. v. Eye Specialists, Inc.*, 173 Ohio App.3d 108, 2007-Ohio-4403, 877 N.E.2d 709, in which the trial court inserted the requisite Civ.R. 54(B) language in its judgment entry, recognized that "*Wisintainer* sets forth a deferential standard and we are always reluctant to strike a Civ.R. 54(B) certification." Yet, the *Portco* court held that the trial court should not have included the "no just reason for delay" language; whereas, in the case before us, "nothing in the record suggests that the certification serves 'sound judicial administration' ***,"

and "a partial final order is not appealable pursuant to Civ.R. 54(B) if pending unresolved counterclaims touch 'upon the [very] same facts, legal issues and circumstances as the original claim.'" Id.

{¶ 12} We find that the declaratory judgment issue -- whether or not R.C. Chapter 2744 is unconstitutional -- is inextricably intertwined with the trial court's determination that the City of Parma is entitled to governmental immunity under the statute.

{¶ 13} In *Ollick v. Rice* (1984), 16 Ohio App.3d 448, 476 N.E.2d 1062, the court held that "the appellate court is without jurisdiction to entertain the appeal until all of the intertwined claims are final." In *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221, 904 N.E.2d 863, the Ohio Supreme Court found there was no final appealable order where the trial court had determined the declaratory judgment action but ignored the related damages issue. The *Walburn* Court held that "in a case involving multiple claims, a judgment in a declaratory judgment action is not a final appealable order when the trial court finds that an insured is entitled to coverage but has not addressed the issue of damages, even though the order includes a Civ.R. 54(B) certification." See, also, *Int'l Managed Care Strategies, Inc. v. Franciscan Health P'ship, Inc.,* 1st Dist. No. C-010634, 2002-Ohio-4801, at ¶9 (holding that "[w]here claims arise from the same alleged conduct, they are inextricably intertwined and not appealable despite Civ.R. 54(B) certification").

{¶ 14} In this case, we have already determined that the attorney general was properly served and that the trial court must resolve the constitutional challenge to

R.C. 2744 before its judgment becomes a final appealable order. We cannot see how the trial court can grant summary judgment as a matter of law on the basis of governmental immunity without first determining whether the governmental immunity statute is constitutional.

{¶ 15} Because the trial court did not dispose of Pesta's declaratory judgment claim, we lack a final appealable order and do not have jurisdiction to hear this appeal.

Dismissed.

It is ordered that appellees recover of appellant costs herein taxed.

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

FRANK D. CELEBREZZE, JR., JUDGE

KENNETH A. ROCCO, P.J., and
ANN DYKE, J., CONCUR