

[Cite as *Midwestern Indemn. Co. v. Nierlich*, 2009-Ohio-3472.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
**No. 92526**

---

**THE MIDWESTERN INDEMNITY COMPANY**

PLAINTIFF-APPELLANT

vs.

**JOHN K. NIERLICH, ET AL.**

DEFENDANTS-APPELLEES

---

**JUDGMENT:  
DISMISSED**

---

Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-567862

**BEFORE:** McMonagle, P.J., Blackmon, J., and Stewart, J.

**RELEASED:** July 16, 2009

**JOURNALIZED:**

**ATTORNEYS FOR APPELLANT**

Craig G. Pelini  
Randall M. Traub  
Pelini Campbell Williams & Traub LLC  
8040 Cleveland Avenue, N.W.  
Suite 400  
North Canton, OH 44720

**ATTORNEY FOR APPELLEES**

Ed E. Duncan  
Tucker Ellis & West LLP  
925 Euclid Avenue  
1150 Huntington Building  
Cleveland, OH 44115-1414

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).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} This is the second time this insurance coverage case has been on appeal to this court. The first appeal was dismissed; although we would prefer to address the merits, we reluctantly dismiss again for lack of a final appealable order.

I

{¶ 2} In July 2005, plaintiff-appellant, The Midwestern Indemnity Company, filed a complaint seeking a declaratory judgment that it owed no duty to defend or indemnify defendants Richard A. Puzzitiello, Park Group East Inc., Park Southern Builders of Pinellas, Inc., John Nierlich, Carol Chandler, Reserve Developers L.L.P., The Park Group Companies of America, Inc., and Banyon Lakes C. Corp. in litigation pending in a Florida federal district court. The defendants answered and counterclaimed for a declaratory judgment that Midwestern owed a duty to defend them in the federal action.

{¶ 3} The defendants subsequently filed a motion for summary judgment; Midwestern filed a brief in opposition and a cross-motion for summary judgment. On September 12, 2007, the trial court issued a judgment entry granting the defendants' motion and declaring that Midwestern owed Puzzitiello, Park Group East Inc., and Park Southern Builders of Pinellas, Inc. a duty to defend in the federal action pending in the Florida court.

{¶ 4} Midwestern appealed from the trial court's judgment on October 11, 2007. On October 24, 2007, while the appeal was pending, the trial court issued a judgment entry clarifying its September 12, 2007 entry. (Despite Midwestern's assertion otherwise, this entry was not a nunc pro tunc entry.) In its entry, the court determined that Puzzitiello, Park Group East, and Park Southern Builders were insureds under policies issued by Midwestern to Puzzitiello and that Midwestern owed a duty to defend them because the federal complaint (amended several times) stated various claims against them that were either "expressly, or potentially or arguably" within the policies' coverage and no exclusions applied.

{¶ 5} On July 17, 2008, this court dismissed Midwestern's appeal for lack of a final appealable order. *The Midwestern Indemnity Co. v. Nierlich*, 8<sup>th</sup> Dist. No. 90536, 2008-Ohio-3537. This court held that the trial court's entry made no declaration regarding Midwestern's duty to defend or indemnify defendants John Nierlich, Carol Chandler, Reserve Developers L.L.P., The Park Group Companies of America, Inc., and Banyon Lakes C. Corp., and did not include the Civ.R. 54(B) language stating there was no just reason for delay, which is required for a final appealable order when a trial court disposes of some but not all claims in an action. This court also noted that the trial court's order resolved only the duty to defend and did not address Midwestern's duty to indemnify.

{¶ 6} On November 14, 2008, after this court had dismissed Midwestern's appeal, the trial court issued another judgment entry. In that entry, the trial

court *vacated* its entry of September 12, 2007. It granted the defendants' motion for summary judgment as to defendants Puzzitiello, Park Group East Inc., and Park Southern Builders of Pinellas, Inc. and denied the motion as to the remaining defendants, as it was undisputed that they were not insureds under any of the policies. The court declared that Midwestern owed a duty to defend Puzzitiello, Park Group East Inc., and Park Southern Builders of Pinellas, Inc. in the federal litigation, but had no duty to defend or indemnify the remaining defendants. The court stated further that it was making no declaration regarding Midwestern's duty to indemnify Puzzitiello, Park Group East, and Park Southern Builders because until the underlying litigation was completed, it was premature to consider their liability or the extent to which any such liability might trigger Midwestern's duty to indemnify under the various policies. The trial court's entry included the requisite Civ.R. 54(B) language.

{¶ 7} Midwestern now appeals from the November 14, 2008 judgment.

## II

{¶ 8} It is well settled that "when a trial court enters a judgment in a declaratory judgment action, the order must declare all of the parties' rights and obligations in order to constitute a final, appealable order." *Am. Family Ins. Co. v. Johnson* (Feb. 8, 2007), 8<sup>th</sup> Dist. No. 88023, 2007-Ohio-7271, citing *Stiggers v. Erie Ins. Group*, 8<sup>th</sup> Dist. No. 85418, 2005-Ohio-3434. Further, "[a]s a general rule, a trial court does not fulfill its function in a declaratory judgment action

when it fails to construe the documents at issue.” *Id.*, citing *Highlands Business Park, LLC v. Grubb & Ellis Co.*, 8<sup>th</sup> Dist. No. 85225, 2005-Ohio-3139.

{¶ 9} Here, the trial court’s judgment entry appropriately addresses all of the defendants, finds a duty to defend, and adequately addresses the unresolved indemnification issue by way of the Civ.R. 54(B) language. But, it does not construe the documents at issue. Although the court’s entry dated October 24, 2007 construed the policies to find a duty to defend, that entry clarified the trial court’s September 12, 2007 judgment, which the court vacated by its entry dated November 14, 2008. Accordingly, the October 24, 2007 entry refers to nothing. The trial court’s November 14, 2008 judgment entry does not incorporate or mention that portion of the October 24, 2007 entry that refers to the policies and does not discuss the insurance policies at issue. Thus, the court’s judgment does not declare the parties’ rights and obligations under the policies. Without such a declaration, the trial court’s judgment does not qualify as a final appealable order and must be dismissed.

Dismissed.

It is ordered that the parties share equally the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and  
MELODY J. STEWART, J., CONCUR