[Cite as *Gehm v. Timberline Post & Frame* , 2005-Ohio-5222.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

HARRY GEHM

Appellee

v.

TIMBERLINE POST & FRAME

Appellee

v.

WESTFIELD INSURANCE CO.

Appellant

C. A. No. 22479

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2004-10-5803

DECISION AND JOURNAL ENTRY

Dated: September 30, 2005

This cause was heard upon the record in the trial court and the following disposition is made:

PER CURIAM.

{¶1} Appellant, Westfield Insurance Company, appeals the trial court's decision denying its motion for leave to intervene in a case in which Appellant's insured, Timberline Post & Frame (Timberline), is being sued for damages by Harry Gehm.

{¶2} On October 15, 2004, Mr. Gehm filed a complaint against Timberline. Mr. Gehm is seeking damages from Timberline relating to the

construction of a building on his property. On December 13, 2004, Appellant filed a motion for leave to intervene in the action as a new party Defendant. Per judgment entry nunc pro tunc, the trial court denied Appellant's motion for leave to intervene on February 25, 2005.

{¶3} Appellant appeals the trial court's order, asserting one assignment of error for our review. We find that the order from which Appellant appeals is not a final appealable order, and thus, we lack jurisdiction to hear the instant appeal.

{¶4} R.C. 2505.02 provides in pertinent part as follows:

> "A) As used in this section:
>
> "1) 'Substantial right' means 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.
>
> ***
>
> "B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> "1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment [.]"

As Civ.R. 24(A) provides the right to intervene; we agree that the trial court's judgment affects a substantial right. We cannot conclude, however, that the trial court's denial of the motion "determines the action and prevents a judgment."

{¶5} Appellant asserts that if it is not permitted to intervene in the instant matter, collateral estoppel will preclude it from relitigating facts in a subsequent proceeding. In support, Appellant relies upon *Howell v. Richardson* (1989), 45

Ohio St.3d 365. In *Howell*, the insurance company never attempted to intervene in the original civil action. Accordingly, the Court held that collateral estoppel "applies likewise to those in privity with the litigants and to those who could have entered the proceeding but did not avail themselves of the opportunity." Id., at 367.

{¶6} In the instant matter, Appellant did seek to intervene. Upon filing its motion, the trial court found that trial should proceed without Appellant as a party. Appellant's motion to intervene, and the trial court's subsequent denial of that motion, preserved Appellant's ability to litigate its claims in a subsequent suit. An element of collateral estoppel, the ability to have previously litigated an issue, could not apply to bar subsequent litigation by Appellant because the trial court has determined that Appellant cannot intervene. Accordingly, the trial court's judgment does not determine the action and prevent judgment with respect to the issues raised by Appellant.

{¶7} Additionally, Civ.R. 54(B) provides:

> "When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which *adjudicates fewer than all* the claims *or the rights and liabilities of fewer than all the parties*, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment

> adjudicating all the claims and the rights and liabilities of all the parties." (Emphasis added.)

{¶8} In the instant matter, the trial court's denial of Appellant's motion to intervene adjudicated the procedural rights of Appellant, i.e., Appellant's right to intervene, but left the substantive claims of the plaintiff, Mr. Gehm, pending in the trial court. Further, even a finding that the denial of Appellant's motion was a final appealable order under R.C. 2505.02 does not obviate the need for Civ.R. 54(B) language.

> "An appellate court, when determining whether a judgment is final, must engage in a two-step analysis. First, it must determine if the order is final with the requirements of R.C. 2505.02. If the court finds that the order complies with R.C. 2505.02 and is in fact final, then the court must take a second step to decide if Civ.R. 54(B) language is required." *Gen. Accident Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 21.

{¶9} As the trial court's denial of the motion to intervene did not determine Appellant's action or prevent judgment on Appellant's claims, i.e., the trial court's ruling does not effect Appellant's right to litigate coverage in the future, and did not include the language required by Civ.R. 54(B), we do not have jurisdiction to hear this matter. Therefore, we dismiss Appellant's appeal.

Appeal dismissed.

The Court finds that there were reasonable grounds for this appeal.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant,

Exceptions.

DONNA J. CARR
FOR THE COURT

CARR, J.
MOORE, J.
CONCURS

SLABY, P. J.
DISSENTS, SAYING:

{¶10} I believe that the trial court erred in denying Appellant's motion to intervene and I would reverse, allowing Appellant to intervene in the underlying action.

{¶11} Harry Gehm filed the underlying action in the Summit County Court of Common Pleas, Case Number 2004-10-5803. In the complaint, he alleges that he and Timberline had entered into a contract for the construction of a building on Mr. Gehm's property. Mr. Gehm claims that Timberline breached the contract by failing to repair or correct defects and deficiencies in the building after being

notified of them. His complaint seeks rescission of the contract and damages in excess of $25,000.00 for breach of warranty, breach of contract, negligence and unjust enrichment.

{¶12} At the time of the building construction at issue in the underlying claim, Timberline had a policy of commercial insurance issued by Westfield Insurance Company (Appellant). Appellant states that upon being notified of the litigation, Timberline contacted Appellant requesting that Appellant provide a defense attorney and indemnification. Appellant provided Timberline with defense counsel "while expressly reserving all of [its] rights and defenses under the policy, through a Reservation of Rights."

{¶13} Appellant thereafter filed its Motion for Leave to Intervene in the underlying action. Appellant argues that the factual determination of the damages will be "crucial concerning the determination of the issue of whether the exclusions set forth in [the insurance] policy bar coverage," and thus, the trial court erred in denying its motion.

{¶14} Appellant's motion to intervene was neither contested at the trial court level, nor was it contested on appeal. Furthermore, in its journal entry, the trial court merely stated that the motion was denied without any mention as to reasons behind its decision. Thus, App.R. 18(C) permits reversal of the decision of the trial court if the facts and issues as stated in Appellant's brief appear to sustain such action.

{¶15} Civ.R. 24(A) permits a party to intervene in an action in which it has an interest and intervention is necessary to protect that interest. Pursuant to Civ.R. 24(A), four elements must be met before a party may intervene:

> "(1) the intervenor must claim an interest relating to the property or transaction that is the subject of the action; (2) the intervenor must be so situated that the disposition of the action may, as a practical matter, impair or impede the intervenor's ability to protect his or her interest; (3) the intervenor must demonstrate that his or her interest is not adequately represented by the existing parties; and (4) the motion to intervene must be timely." *Henderson, Admr. v. Luhring*, 5th Dist. No. 02-COA-017, 2002-Ohio-4208 at ¶16, citing *Fairview Gen. Hosp. v. Fletcher* (1990), 69 Ohio App.3d 827, 831.

{¶16} As no objections have been made as to whether Appellant has met any of the above elements, I will consider whether Appellant's arguments support its claim that it should be permitted to intervene. Regarding the first element to be met before a party may intervene, Appellant asserts that intervention in the underlying case is necessary to preserve defenses that it has under the insurance policy that Timberline maintained. Under the aforesaid insurance policy, Timberline is not covered for certain types of damage to property or work. Appellant thus claims that the factual determination of what category Mr. Gehm's damages fall under effect whether or not Appellant must indemnify Timberline and, if so, in what amount. Thus, Appellant has a financial interest at stake in the underlying action and the first element is met.

{¶17} In regard to the second element, we look to *Howell v. Richardson*, 45 Ohio St.3d 365, 368, in which the Supreme Court held that: "where a

determination is made in an initial action instituted against a tortfeasor relative to his culpable mental state, collateral estoppel precludes relitigation of the determination in a subsequent proceeding brought against his insurer[.]" As Appellant is in privity with Timberline and as it would be barred from relitigating certain factual determinations if it were not permitted to intervene in the underlying actions pursuant to *Howell*, I find that the second requirement has been met.

{¶18} The third element that Appellant must show is that its interest would not be adequately represented by the current parties. It is sufficient to say that neither the property owner nor the insured contractor has an interest in protecting and representing Appellant insurance company's interests. In fact, in certain circumstances, Appellant's interests may be contrary to the interests of the instant parties to the action.

{¶19} Finally, Appellant's motion to intervene must be timely for the fourth element to be met to allow Appellant to intervene in the underlying action. Appellant's motion to intervene was amongst the first documents filed in the underlying action, consequently, Appellant has met the fourth requirement.

{¶20} Appellant has met all four elements necessary for a party to intervene. In *Thomas v. Cook Drilling Corp*. (1997), 79 Ohio St.3d 547, the Supreme Court found that it was not an abuse of discretion to deny an untimely motion to intervene where the insurance company in question had no interest in

the action. In the instant case however, Appellant's motion was timely made and it demonstrated an interest in the underlying action. Appellant "is so situated [that] the disposition of [the underlying] action may impair or impede its ability to protect its interest unless it is permitted to intervene in the action." *Sabbato v. Hardy* (July 23, 2001), 5th Dist. No. 2001CA00045, at 7. Therefore, I would find that the trial court abused its discretion in denying Appellant's motion for leave to intervene in the underlying action.

APPEARANCES:

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