[Cite as *Dywidag Sys. Internatl., USA, Inc. v. Ohio Dept. of Transp.*, 2010-Ohio-3211.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Dywidag Systems International, USA, Inc.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-270
	:	(C.C. No. 2007-07868)
Ohio Department of Transportation,	:	(REGULAR CALENDAR)
Defendant-Appellee,	:	
(Insteel Wire Products Company,	:	
Third-Party Defendant-Appellee).	:	

D E C I S I O N

Rendered on July 8, 2010

Marshall & Melhorn, LLC, *Thomas W. Palmer* and *John A. Borell, Jr*., for appellant.

Porter Wright Morris & Arthur LLP, David P. Shouvlin, Kathleen M. Trafford, and *Ryan P. Sherman,* for appellee.

ON MOTION

CONNOR, J.

{¶1} Plaintiff-appellant, Dywidag Systems International, USA, Inc. ("appellant" or "DSI"), has appealed the decision of the Court of Claims of Ohio, which granted third-party defendant-appellee, Insteel Wire Products Company's ("appellee" or "Insteel"), motion for summary judgment, thereby eliminating appellee as a party to the case.

Appellee filed a motion to dismiss, requesting the issuance of an order dismissing the appeal, arguing this court lacks subject-matter jurisdiction. Because the judgment from which appellant appeals is a final appealable order, we deny appellee's motion to dismiss the appeal.

{¶2} As part of a construction project involving I-480 and the creation of a new bridge known as the Veterans' Glass City Skyway, in Toledo, Ohio, defendant-appellee Ohio Department of Transportation ("ODOT"), contracted with DSI to supply various material to construct the bridge, including epoxy-coated steel wire strands ("the strand"). Because DSI does not fabricate epoxy-coated steel wire strands, DSI contracted with Insteel to supply the two million feet of strand needed for the project. Insteel shipped the strand between May 2002 and January 2003, but for various reasons, the bridge project was substantially delayed. As a result, the strand sat in a warehouse for several years until ODOT began to install the strand in July 2006, at which time ODOT allegedly discovered flaws with the strand. ODOT then rejected the strand and required DSI to furnish a new strand.

{¶3} DSI contacted Insteel, requesting that it replace the defective strand and also indemnify and defend DSI for any liability it owed to ODOT. Insteel refused, so DSI purchased the new strand from another source at a cost of over $2.7 million. Additional project costs were incurred as a result of the removal of the defective strand, the installation of the replacement strand, and the corresponding delays.

{¶4} DSI filed a complaint against ODOT seeking declaratory relief and monetary relief regarding the replacement of the strand. ODOT filed a counterclaim against DSI alleging breach of contract and seeking damages in excess of $8 million.

DSI then filed a third-party complaint against Insteel seeking indemnity/contribution and declaratory judgment, as well as alleging breach of contract, breach of good faith, unjust enrichment, and breaches of express and implied warranties.

{¶5} On November 30, 2009, the Court of Claims granted summary judgment in favor of Insteel on DSI's claims for breach of express warranty, breach of implied warranty, and contractual indemnity on the grounds they were barred by the statute of limitations. As to DSI's claims for common law indemnity, contribution, unjust enrichment, and breach of good faith, the Court of Claims dismissed those allegations for failure to state a claim upon which relief could be granted. Thus, the court entered judgment in favor of Insteel as to the third-party complaint in its entirety. The court's judgment entry did not include Civ.R. 54(B) language.

{¶6} On February 1, 2010, DSI filed a motion asking the Court of Claims to amend its entry by including Civ.R. 54(B) language expressly determining there was "no just reason for delay," arguing that an immediate appeal would serve the interests of judicial economy by precluding the possibility of two trials. Insteel opposed the motion. On February 24, 2010, the Court of Claims issued a judgment entry finding the interests of judicial economy would best be served by an immediate appeal. The judgment entry contained express Civ.R. 54(B) language stating "there is no just reason for delay." DSI then filed its appeal in this court regarding only the claims at issue in its third-party complaint against Insteel. The claims and counterclaims between DSI and ODOT regarding principal liability remain unadjudicated.

{¶7} On May 12, 2010, Insteel filed the instant motion to dismiss, arguing this court lacks subject-matter jurisdiction in this appeal because indemnity claims are not

appropriate for Civ.R. 54(B) certification. Insteel submits the trial court abused its discretion in granting the certification to make this action a final appealable order. DSI filed a memorandum in opposition on June 10, 2010, claiming an immediate appeal serves the interest of judicial economy. Insteel was granted leave to file a reply instanter on June 21, 2010. We now determine whether or not this appeal constitutes a final appealable order.

{¶8} An appellate court has jurisdiction to review and affirm, modify, or reverse judgments or final orders of the trial courts within its district. See Section 3(B)(2), Article IV, Ohio Constitution; see also R.C. 2505.02 and *Fertec, LLC v. BBC & M Engineering, Inc*., 10th Dist. No. 08AP-998, 2009-Ohio-5246. To constitute a final order, the order must fit into at least one of the categories set forth in R.C. 2505.02(B). R.C. 2505.02(B) defines a final order, in relevant part, as 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;
>
> (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
>
> (3) An order that vacates or sets aside a judgment or grants a new trial[.]

{¶9} R.C. 2505.02(A) defines a "substantial right" as "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." It further defines a "special proceeding" as "an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity."

{¶10} The Supreme Court of Ohio has determined that 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. R.C. 2505.02 must also be read in conjunction with Civ.R. 54(B). See *Kopp v. Associated Estates Realty Corp*., 10th Dist. No. 08AP-819, 2009-Ohio-2595, ¶9, citing *Denham v. New Carlisle*, 86 Ohio St.3d 594, 596, 1999-Ohio-128. Civ.R. 54(B) provides a procedure for dealing with the situation where "some * * * distinct branch" of a case is adjudicated but the whole case is not determined. See *Noble v. Colwell* (1989), 44 Ohio St.3d 92, fn 3. 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.

{¶11} Therefore to qualify as final and appealable, the trial court's order must satisfy the requirements of R.C. 2505.02, and if the action involves multiple claims and the order does not enter a judgment on all the claims, as is the case here, the order must also satisfy Civ.R. 54(B) by including express language that "there is no just reason for delay." *Internatl. Bhd. of Electrical Workers, Local Union No. 8 v. Vaughn Indus., L.L.C*., 116 Ohio St.3d 335, 2007-Ohio-6439, ¶7, citing *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, ¶5-7.

{¶12} The Supreme Court of Ohio has established a two-step process for determining whether an order is both final and appealable. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am*. (1989), 44 Ohio St.3d 17. In the first step, the appellate court must determine whether the order fits within one of the categories set forth in R.C. 2505.02(B) and thus constitutes a final order. *Olive Branch Holdings, L.L.C. v. Smith Technology Dev., L.L.C.*, 181 Ohio App.3d 479, 2009-Ohio-1105, ¶13, citing *Noble* and *Gen. Acc. Ins. Co*. If the order satisfies R.C. 2505.02(B), then the second step requires the court to determine whether Civ.R. 54(B) language is required. Id. at ¶14. In the absence of express Civ.R. 54(B) language, an appellate court may not review an order disposing of fewer than all claims. *Internatl. Bhd. of Electrical Workers* at ¶8, citing *Scruggs* at ¶6. However, "the mere incantation of the required language does not turn a non-final order into a final appealable order." *Noble* at 96.

{¶13} An order allowing or dismissing a third-party complaint is not a final appealable order unless there is an express determination that there is no just reason for delay. "In that event, the judgment is reviewable upon the determination of no reason for delay, as well as for the error in allowing or dismissing the third-party complaint[.]" *State ex rel. Jacobs v. Municipal Court of Franklin Cty.* (1972), 30 Ohio St.2d 239, syllabus.

{¶14} Pursuant to R.C. 2505.02(B), "in order to be final, the order granting and denying partial summary judgment in the present case must affect a substantial right and either determine the action and prevent a judgment, or be made in a special proceeding." *DeAscentis v. Margello*, 10th Dist. No. 04AP-4, 2005-Ohio-1520, ¶18. Unless the order *affects* a substantial right, it is not a final order. Id. at ¶19, citing *Burt v. Harris*, 10th Dist. No. 03AP-194, 2004-Ohio-756. An order which affects a substantial right is perceived to

be one which, if not immediately appealable, would foreclose appropriate relief in the future. Id. at ¶19, citing *Bell v. Mt. Sinai Med. Ctr*. (1993), 67 Ohio St.3d 60, 63.

{¶15} Neither party seems to truly address or analyze whether the appeal meets the first prong of the two-part test set forth above. Instead, both sides seem to simply assert the trial court's order is final pursuant to R.C. 2505.02(B) and thus place their focus upon the issue of Civ.R. 54(B) certification. However, because this issue involves a jurisdictional question, we analyze it sua sponte and make a determination. See generally *State ex rel. White v. Cuyahoga Metro. Hous. Auth*., 79 Ohio St.3d 543, 1997-Ohio-366.

{¶16} In *Elkins v. Access-Able, Inc.*, 10th Dist. No. 04AP-101, 2004-Ohio-4101, we examined the denial of a summary judgment motion regarding the requested dismissal of a third-party complaint claiming contribution and indemnification. In that case, we determined that an order involving a third-party complaint alleging contribution and indemnification did not qualify as a "special proceeding" pursuant to R.C. 2505.02(B)(2), and thus was not a final order under that subsection. Therefore, we examine this case under R.C. 2505.02(B)(1) to determine if the trial court's order constitutes an order affecting a substantial right that, in effect, determines the action and prevents a judgment.

{¶17} DSI's third-party complaint against Insteel asserts a claim for contribution and indemnification. The indemnity provision in DSI's "Terms and Conditions," upon which DSI relies, reads as follows:

> 12. Indemnity – The Seller shall indemnify, hold harmless, and defend the Buyer from and against any and all claims, suits, actions, proceedings, liabilities, damages, demands, costs and expenses of whatsoever kind and

> character (including but not limited to attorney's fees and expenses) arising out of or by reason of any injuries (including death) or damage to any persons, or damage to property of any persons or economic loss to any person, or violation of any Statute or regulation, cause[d] in whole or in part, or claimed to be caused in whole or in part or contributed to by any act, omission, fault or negligence of the Seller or anyone acting in its behalf or by reason of any fault or defect in any of the goods covered by this purchase order. This indemnity shall apply notwithstanding that any fault or negligence of Buyer is or is alleged to be a contributing factor in such matter.

{¶18} DSI's third-party complaint against Insteel asserting indemnification was filed in response to ODOT's counterclaim filed against DSI, alleging breach of contract and seeking damages in excess of $8 million. Contained within and as part of this indemnification claim, DSI's third-party complaint alleges Insteel is required to indemnify and defend DSI from and against any and all claims, including economic loss, caused in whole or in part or contributed to by Insteel. In granting summary judgment in favor of Insteel on the contractual indemnity and breach of warranty claims, and in dismissing the remaining claims in the third-party complaint on the grounds of failure to state a claim, the trial court effectively determined Insteel had no duty to defend DSI.

{¶19} We find a review of current caselaw involving insurance coverage issues, which is similar to indemnification, is instructive here in analyzing whether the trial court's order in this case affected a substantial right. In *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221, the Supreme Court of Ohio determined that a finding that a party was entitled to insurance coverage without addressing the issue of damages did not affect a substantial right. Id. at ¶26. The Supreme Court of Ohio further found it was not a final appealable order, despite the trial court's certification under Civ.R. 54(B). See also *Tinker*

v. Oldaker, 10th Dist. No. 03AP-671, 2004-Ohio-3316 (an order determining coverage but not deciding damages did not affect a substantial right and was not a final order) and *Kallaus v. Allen*, 5th Dist. No. 09-CA-0002, 2009-Ohio-6339 (where the duty to defend is not involved, whether the declaration is one finding coverage or not finding coverage, the analysis is no different if the damages are still unresolved).

{¶20} Thus, it would seem to follow that if the issue here was strictly one of indemnification, even though in this case the "coverage" or indemnification rights were denied, since the issue of liability and damages has not yet been adjudicated, DSI's substantial rights may not be affected and there may be no final order pursuant to R.C. 2505.02(B)(1). But, see *Braelinn Green Condominium Unit Owner's Assn. v. Italia Homes, Inc*., 10th Dist. No. 09AP-1144, 2010-Ohio-2371, which does not appear to distinguish between a duty to defend and indemnity, and which found that a substantial right was affected. Here, however, DSI's complaint also asserted that, pursuant to DSI's contractual agreement with Insteel, Insteel agreed to defend DSI. As discussed above, the trial court's order granting summary judgment to Insteel on the contractual indemnity claim thereby also eliminated DSI's assertion that Insteel was required to defend it. Therefore, we must address that issue as well.

{¶21} In *Gen. Acc. Ins. Co.*, paragraph one of the syllabus, the Supreme Court of Ohio found the duty to defend involved a substantial right. In *Walburn*, the Supreme Court of Ohio reiterated that the duty to defend was of great importance to both the insured and the insurer and stated it involved a substantial right. Additionally, in *Braelinn Green Condominium Unit Owner's Assn*., we also determined that the duty to defend involved a substantial right and constituted a final order under R.C. 2505.02.

{¶22} Based upon this, we find the trial court's order in the instant case affects a substantial right and determines the action between DSI and Insteel by preventing a judgment as to Insteel. The order, which granted summary judgment in favor of Insteel, dismissed the indemnification claim (including the duty to defend) as well as all other causes of action between DSI and Insteel. As a result, DSI cannot recover from Insteel. Given that the duty to defend is a substantial right which will impact DSI's defense, if our review of this issue were delayed, DSI would not be afforded appropriate relief in the future by way of another appeal. Therefore, we find the trial court's order meets the requirement of a final order pursuant to R.C. 2505.02(B)(1).

{¶23} Our next step involves an analysis under Civ.R. 54(B). Ohio appellate courts have held that resolution of an insurer's duty to defend and/or indemnify is not a final and appealable order without the inclusion of Civ.R. 54(B) language when there are other claims which are still pending. See *Braelinn Green Condominium Unit Owner's Assn*. Because the trial court's order only addressed the claims within the third-party complaint, therefore leaving all of the claims between ODOT and DSI unadjudicated, we find Civ.R. 54(B) language is required to immediately make this a final appealable order. Such language was included here. This now brings us to the issue of whether the trial court abused its discretion in making the certification by including language declaring "there is no just reason for delay" in bringing this appeal.

{¶24} Insteel argues the trial court improperly provided Civ.R. 54(B) certification, claiming this case is not suited for such certification, since it involves an indemnity or contribution claim against a third party that is contingent upon the resolution of principal liability claims, which have not yet been adjudicated. Because DSI's indemnity claim

against Insteel only arises if DSI is found to be liable to ODOT on the underlying breach of contract claim, Insteel argues this action should not have been certified for appeal, since this issue could become moot if DSI is ultimately found not liable to ODOT. Insteel cites to federal authority, including caselaw from the Sixth Circuit, as well as two federal treatises on civil procedure, to support its position that it is an abuse of discretion for a trial court to utilize Civ.R. 54(B) language in cases involving indemnification or contribution when the underlying liability claims are still pending. However, Insteel acknowledges that no Ohio courts have explicitly addressed this precise issue.

{¶25} DSI, on the other hand, submits the trial court's Civ.R. 54(B) certification was proper because it serves the interest of judicial economy. DSI further argues the trial court properly supported its determination that an immediate appeal would result in judicial economy. DSI notes the Court of Claims cited to the fact that an immediate appeal would ensure that certain material factual issues common to all of the claims for relief, such as whether the strand manufactured by Insteel met ODOT's project specifications, would be finally determined in a single proceeding and would prevent potentially inconsistent rulings arising from separate trials. DSI argues an immediate appeal will facilitate the prospects of settlement, and thereby preserve judicial resources. DSI also argues, for the first time, that even if ODOT does not recover against DSI because there is determined to be no liability, this appeal would not be moot, as it will also determine the additional issue of Insteel's alleged duty to defend DSI.

{¶26} Civ.R. 54(B) certification serves to demonstrate that the trial court has determined that its order should be appealable. *Mynes v. Brooks*, 124 Ohio St.3d 13, 2009-Ohio-5946, ¶9. The purpose of Civ.R. 54(B) is to reconcile the strong policy against

piecemeal litigation with the possible injustice of delayed appeals in special situations. *Olive Branch Holdings, L.L.C.*, at ¶20, citing *Noble* at 96. A trial court's use of Civ.R. 54(B) certification is discretionary. *Noble* at 96-97 and fn. 7.

{¶27} For purposes of a Civ.R. 54(B) certification, the trial court must make a factual determination as to whether or not an interlocutory appeal is consistent with the interests of sound judicial administration. *Wisintainer v. Elcen Power Strut Co*., 67 Ohio St.3d 352, 1993-Ohio-120, paragraph one of the syllabus. In making the determination that allowing an immediate appeal will best serve the interests of judicial economy, "the trial court is entitled to the same presumption of correctness that it is accorded regarding other factual findings. An appellate court should not substitute its judgment for that of the trial court where some competent and credible evidence supports the trial court's factual findings." Id. at 355, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77. "Where the record indicates that the interests of sound judicial administration could be served by a finding of 'no just reason for delay,' the trial court's certification determination must stand." *Wisintainer* at paragraph two of the syllabus. Furthermore, an appellate court need not find the trial court's certification is the most likely route to judicial economy, but simply that it is one route which might lead there. Id. at 355.

{¶28} Trial judges are granted this discretion because they are in the best position to determine whether an appeal of a final order addressing fewer than all of the parties in a multi-party case will be most efficiently heard prior to trial on the merits. Id. at 354-55. This is because the trial court is familiar with the action and can best determine how the court's and the parties' resources may be effectively utilized. Id. at 355. The trial court is

also in the best position to determine whether declining to grant a final order might result in the case being tried twice. Id. at 355. The avoidance of piecemeal trials is more important than the avoidance of piecemeal appeals, as it conserves expenses for the parties and also helps clarifies liability issues for jurors when cases are tried without "empty chairs." Id. at 355.

{¶29} A trial court is not required to give reasons for its decision to add Civ.R. 54(B) language to an interlocutory order, so long as the record supports adding the language. *Shore v. Consol. Rail Corp*. (June 21, 1991), 6th Dist. No. 90-OT-019. If certification is reasonable, the appeal will not be dismissed. *AMDO Dev. Co., Inc. v. Woolpert Consultants* (Jan. 29, 1993), 1st Dist. No. C-910951. However, the presumption of correctness that normally attaches to the trial court's finding of "no just reason for delay" for an immediate appeal does not apply where the judgment entry indicates the trial court acted reflexively and employed the language as boilerplate. *Mackey v. Pilarczyk* (Sept. 27, 1995), 1st Dist. No. C-940845.

{¶30} Here, although the trial court provided only one reason for adding Civ.R. 54(B) language (the possibility of two trials involving the same factual issue of whether the strand met ODOT's project specifications), we find the record provides additional support for adding such language. For example, the record demonstrates the trial court did not act reflexively in finding "no just reason for delay." It acted only after DSI filed a motion seeking an order to amend the earlier issued order. As a result, the trial judge did not just mechanically sign a boilerplate summary judgment entry, but instead considered the arguments of both sides and reached a reasoned decision which could lead to judicial economy. See generally *Wisintainer*.

{¶31} Furthermore, an immediate appeal could present the most efficient and straightforward trial, if the trial court did in fact err in granting summary judgment with respect to the third-party complaint, as it would allow one trial with all of the parties present. Those parties would then have the ability to present evidence against each other, thereby possibly helping to clarify liability issues.

{¶32} Insteel, however, argues that certification under these circumstances is improper. This argument is based upon several federal cases, including a Sixth Circuit case, *Corrosioneering, Inc. v. Thyssen Environ. Sys., Inc*. (C.A.6, 1986), 807 F.2d 1279, as well as two federal treatises, which find certification of cases involving indemnification claims where there has been no adjudication as to the underlying liability claims, is an abuse of discretion. However, Ohio courts are not bound by decisions of the United States Court of Appeals for the Sixth Circuit. *State v. Morrison* (Apr. 22, 1976), 10th Dist. No. 75AP-601; *State v. Wolfe* (1987), 41 Ohio App.3d 119. Furthermore, while such authority can be persuasive, we do not find it to be so under the circumstances here, as these circumstances are distinguishable.

{¶33} As we previously noted in the first part of analysis, which we conducted despite the parties' general assertions that the requirements of R.C. 2505.02 had been met, DSI's third-party complaint alleges a duty to defend, in addition to an alleged duty to indemnify. Certification on that issue also serves the interests of judicial economy in that the determination of this issue could prevent the need to address it in a future appeal. At least one other court has found that certification of a ruling on a third-party claim requesting a defense pursuant to a contract is typically a permissible exercise of the court's discretion. See *State of New York v. AMRO Realty Corp.* (C.A.2, 1991), 936 F.2d

1420. This approach also appears to be in line with our determination regarding the finality of the order and whether a substantial right was affected, as analyzed under the first prong of this two-part test.

{¶34} Based upon the analysis above, we find the judgment at issue is both final and appealable. We find no abuse of discretion in the trial court's certification of this matter. Having determined that we have jurisdiction to hear this appeal, we deny Insteel's motion to dismiss for lack of a final appealable order.

Motion denied.

FRENCH and McGRATH, JJ., concur.

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