

[Cite as *Jackson v. Bartec, Inc.*, 2010-Ohio-5558.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

|  |   |                            |
|--|---|----------------------------|
| Alvin D. Jackson, M.D.,                    | : |                            |
| Ohio Department of Health,                 | : |                            |
|  | : |                            |
| Plaintiff-Appellant/<br>Cross-Appellee,    | : |                            |
|  | : |                            |
| v.   | : | No. 10AP-173               |
|  | : | (C.P.C. No. 09CVH08-12197) |
| Bartec, Inc. et al.,                       | : |                            |
|  | : | (REGULAR CALENDAR)         |
| Defendants-Appellees/<br>Cross-Appellants, | : |                            |
|  | : |                            |
| Richard Cordray, Attorney General,         | : |                            |
|  | : |                            |
| Defendant-Cross-Appellee.                  | : |                            |
|  | : |                            |

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D E C I S I O N

Rendered on November 16, 2010

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*Richard Cordray, Attorney General, Angela M. Sullivan and Stacy L. Hannan, for Ohio Department of Health.*

*Ron O'Brien, Prosecuting Attorney, and Tracie M. Boyd, Amicus Curiae, for Franklin County District Board of Health.*

*McTigue & McGinnis LLC, J. Corey Colombo, Donald J. McTigue and Mark A. McGinnis, Amici Curiae, for American Cancer Society et al.*

*Maurice A. Thompson; Cicero Law Office, and Lori R. Withers; and Christopher R. Walsh, for Bartec, Inc. and Richard Allen dba Bartec Victorian Village.*

*Richard Cordray, Attorney General, and Robert C. Moorman, for Ohio Attorney General.*

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant and cross-appellee, Alvin D. Jackson, M.D., Director of Ohio Department of Health ("ODH"), appeals from a judgment of the Franklin County Court of Common Pleas that both denied ODH's request for a permanent injunction and vacated ten existing violations entered against defendants-appellees and cross-appellants, Bartec, Inc., dba Zeno's Victorian Village, and its chief executive officer Richard Allen (collectively "Bartec"), all arising under Ohio's Smoke Free Workplace Act, R.C. Chapter 3794 ("Smoke Free Act"). Because (1) the trial court wrongly vacated Bartec's ten violations of the Smoke Free Act, and (2) ODH is entitled to an injunction against Bartec, we reverse.

### **I. Facts and Procedural History**

{¶2} On August 13, 2009, ODH filed a complaint in the Franklin County Court of Common Pleas, seeking preliminary and permanent injunctions that order Bartec to comply with R.C. Chapter 3794 and to pay all outstanding fines resulting from past violations of the Smoke Free Act. By the time of trial, Bartec had accumulated fines stemming from ten separate violations of the Smoke Free Act.

{¶3} Bartec responded on September 16, 2009 with an answer and counterclaim requesting the trial court declare that (1) relevant portions of the Smoke Free Act and Ohio Adm.Code Chapter 3701 are unconstitutional, either facially or as applied to Bartec; (2) ODH engaged in unlawful rulemaking; (3) ODH engaged in unlawful policymaking; and (4) ODH's interpretations and applications of the Smoke Free Act and the pertinent administrative code provisions violate the statute. Bartec further requested a permanent

injunction prohibiting "[a]ny further unconstitutional or unlawful enforcement of R.C. 3794 and OAC 3701." (Answer, 25-26.)

{¶4} Bartec also asserted a cross-claim against Richard Cordray, Ohio Attorney General ("Attorney General"), seeking a declaration that the Attorney General's collection efforts effectuate a taking of property without just compensation. Bartec concomitantly sought a permanent injunction prohibiting the Attorney General from any current and further collection efforts against Bartec "and similarly situated proprietors that have been, are, and continue to be issued under an unconstitutional framework." (Answer, 26.)

{¶5} The trial court consolidated all of the parties' claims into a single bench trial held November 23, 2009. ODH filed proposed findings of fact and conclusions of law on December 21, 2009; Bartec filed proposed findings of fact and conclusions of law on December 22, 2009. The parties filed post-trial briefs on January 4, 2010.

{¶6} In a February 22, 2010 decision and entry, the trial court denied ODH's request for an injunction and vacated as unenforceable the ten existing violations against Bartec under the Smoke Free Act. The trial court determined the violations resulted because Bartec was "being held responsible for the decisions of a third-party that are out of [Bartec's] control," ODH "implemented a policy of strict liability against property owners for violations of the SmokeFree Act," and ODH's enforcement of the Smoke Free Act was "stricter than allowed by R.C. 3794.02." (Decision and Entry, 9, 11.) Because it vacated the ten underlying citations, the trial court determined it need not address Bartec's constitutional challenges.

## **II. Assignments of Error**

{¶7} On appeal, ODH assigns the following errors:

**Appellant's First Assignment of Error** – The trial court erred as a matter of law when it failed to apply the plain language of the Smoke Free Act.

**Appellant's Second Assignment of Error** – The trial court erred as a matter of law when it held that ODH engaged in unlawful rulemaking.

**Appellant's Third Assignment of Error** – The trial court abused its discretion by denying ODH's Complaint for a Statutory Injunction.

Bartec assigns the following errors on cross-appeal:

*First Assignment of Error*

**The trial court erred by not declaring that enforcement policies and practices of the Ohio Department of Health, pursuant to R.C. 3794.02, to be unlawful.**

*Second Assignment of Error*

**The trial court erred by not issuing a permanent injunction prohibiting any further unconstitutional or otherwise unlawful enforcement of R.C. Chapter 3794 and Ohio Administrative Code 3701.**

*Third Assignment of Error*

**The trial court erred by not issuing a permanent injunction against collection efforts of the Ohio Attorney General against Zeno's.**

For ease of discussion, we group first ODH's first and second assignments of error and then Bartec's first and second assignments of error on cross-appeal.

### **III. Jurisdiction**

{¶8} As a preliminary matter, Bartec argues this court lacks jurisdiction to consider the appeal because the trial court did not issue a final appealable order.

{¶9} Pursuant to Section 3(B)(2), Article IV, Ohio Constitution and R.C. 2503.03, appellate courts have jurisdiction to review only final orders, judgments or decrees.

*Browder v. Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶10. "[T]he entire concept of 'final orders' is based upon the rationale that the court making an order which is not final is thereby retaining jurisdiction for further proceedings. A final order, therefore, is one disposing of the whole case or some separate and distinct branch thereof." *Id.*, quoting *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, quoting *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306. Conversely, "[a] judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order." *Id.*, quoting *State ex rel. Keith v. McMonagle*, 103 Ohio St.3d 430, 2004-Ohio-5580, ¶4, quoting *Bell v. Horton*, 142 Ohio App.3d 694, 696, 2001-Ohio-2593.

{¶10} Thus, to be a final, appealable order, a judgment entry must meet the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). See *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 21. Civ.R. 54(B) "permits both the separation of claims for purposes of appeal and the early appeal of such claims." *Id.* at 21, quoting *Alexander v. Buckeye Pipe Line Co.* (1977), 49 Ohio St.2d 158, 159.

{¶11} Here, the trial court expressly denied ODH's request for a permanent injunction against Bartec and vacated the ten violations against Bartec as unenforceable. Bartec notes that although the trial court failed to rule on its request for declaratory judgment or its request for a permanent injunction against the Attorney General, the trial court did not specify "there is no just reason for delay" pursuant to Civ.R. 54(B). See, e.g., *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. ODH responds that the trial court's decision is final and appealable because it affects a substantial right as defined in R.C. 2505.02(B)(1), it

overruled ODH's motion for statutory injunction, and it granted Bartec's request for declaratory judgment, thus determining all issues.

{¶12} The trial court did not expressly "declare" anything unconstitutional, primarily because the trial court decided the case on other grounds. See *Greenhills Home Owners Corp. v. Greenhills* (1966), 5 Ohio St.2d 207, paragraph one of the syllabus (stating a court "will not exercise its power to determine the constitutionality of a legislative enactment where other issues are apparent in the record, the determination of which will dispose of the case on its merits"). Nonetheless, the trial court, by vacating Bartec's ten existing violations, necessarily found some of the arguments in Bartec's request for declaratory judgment to be persuasive. Similarly, although the trial court did not expressly rule on Bartec's cross-claim against the Attorney General for permanent injunction, the trial court's decision to vacate Bartec's ten existing violations rendered the Attorney General unable to collect any fines resulting from those violations.

{¶13} Where a judgment in an action determines some claims and renders all other claims moot, the judgment is a final appealable order pursuant to R.C. 2505.02, making the language from Civ.R. 54(B) unnecessary. *Wise v. Gursky* (1981), 66 Ohio St.2d 241, 243. See also *Lehtinen v. Drs. Lehtinen, Mervart & West, Inc.*, 99 Ohio St.3d 69, 2003-Ohio-2574, ¶13, n.1. Accordingly, this court has jurisdiction to consider ODH's assignments of error as well as Bartec's assignments of error on cross-appeal.

#### **IV. Overview of Smoke Free Act**

{¶14} The Smoke Free Act, central to the errors the parties assigned on appeal, prohibits smoking in public places or places of employment, with certain exceptions that include private residences, designated smoking rooms in hotels, nursing homes, retail

tobacco stores, outdoor patios, and private clubs. R.C. 3794.02 and 3794.03. Pursuant to R.C. 3794.07, ODH promulgated rules for ODH, or its designee, to use in enforcing the statutory provisions of the Smoke Free Act.

{¶15} Upon receipt of a reported violation, ODH or its designee provides the proprietor of an establishment with a written notice of the reported violation; the proprietor may submit in writing statements or evidence to contest the report. Ohio Adm.Code 3701-52-08(D). ODH reviews the report, the evidence the proprietor submitted to contest the report, as well as other information the investigation yielded, such as interviews and on-site investigations, to determine whether a violation occurred. Ohio Adm.Code 3701-52-08(F)(1)(a). If the violator has no previous violations within the past two years, ODH issues the warning letter contemplated under R.C. 3794.09(A). Ohio Adm.Code 3701-52-08(F)(1)(a). If, however, the alleged violator has a prior violation in the past two years, a fine may issue pursuant to R.C. 3974.09(B) and a more comprehensive administrative review commences, including a hearing that provides the alleged violator with the opportunity to present its case and cross-examine any adverse witnesses. Ohio Adm.Code 3701-52-08(F)(2). See generally *Deer Park Inn v. Ohio Dept. of Health*, 185 Ohio App.3d 524, 2009-Ohio-6836, ¶11.

#### **V. ODH's First and Second Assignments of Error – Vacating Existing Violations**

{¶16} Challenging the trial court's decision to vacate Bartec's ten existing violations, ODH's first and second assignments of error together dispute the trial court's determinations regarding both the plain language of, and ODH's administrative enforcement of, the Smoke Free Act. ODH's first assignment of error thus asserts the trial court erred when it failed to apply the plain language of the Smoke Free Act. ODH

contends the Smoke Free Act places on proprietors the responsibility of enforcing its provisions, but the trial court, ignoring the plain language of the Smoke Free Act, held ODH offended the "basic notions of justice and fair play" when it "implemented a policy placing the burden of enforcing the [Smoke Free] Act against individuals on private property owners such as [Bartec]." (Decision, 9.)

{¶17} Whether the trial court erred in its statutory interpretation is a question of law. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶8. We address questions of law de novo, which requires that we independently review the trial court's decision with no deference granted to the trial court's determination. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108; *Ohio Hosp. Assn. v. Ohio Bur. of Workers' Comp.*, 10th Dist. No. 06AP-471, 2007-Ohio-1499, ¶8.

{¶18} R.C. 3794.02(A) places on proprietors falling under the provisions of the Smoke Free Act at least some responsibility to enforce its terms, stating "[n]o proprietor of a public place or place of employment \* \* \* shall permit smoking in the public place or place of employment." R.C. 3794.02(A). Bartec argues that requiring a proprietor to "not permit" smoking is different than requiring a proprietor to "prohibit" smoking.

{¶19} This court addressed the meaning of the statutory language and held the word "permit" is not vague, "clearly gives notice of the conduct it prohibits and does so in comprehensible, ordinary language not subject to misinterpretation." *Deer Park Inn* at ¶22. The corresponding administrative code section, Ohio Adm.Code 3701-52-08(B), requires a proprietor to take "reasonable steps" to prevent smoke from entering smoke-free areas. The plain language of the Smoke Free Act and corresponding administrative



code provision thus expressly require proprietors to assume a level of responsibility for the conduct occurring at their premises.

{¶20} In what it asserted as a related argument in the trial court, Bartec on appeal strenuously disputes the legality of ODH's enforcement efforts under the statute, an argument the trial court embraced when Bartec raised it there. Accordingly, ODH's second assignment of error asserts the trial court erred when it held ODH engaged in unlawful rulemaking in its enforcement efforts under the statutory provisions, a holding that caused the trial court to vacate Bartec's ten existing violations.

{¶21} The trial court determined ODH implemented a policy of strict liability amounting to an unwritten policy that the trial court treated as an administrative rule. The trial court further concluded such policy "exceeds the authority given to [ODH] by R.C. 3794.02" to enforce the Smoke Free Act. (Decision, 7.) Having concluded ODH "exceeded the authority given to it by R.C. 3794.02 by implementing a policy of strict liability," the trial court also held the citations levied against [Bartec] pursuant to that policy are invalid." (Decision, 8.) The trial court thus effectively granted Bartec's request for a declaratory judgment that ODH unconstitutionally enforced the Smoke Free Act as applied to Bartec in the context of its prior ten violations.

{¶22} In general, a party to an administrative proceeding who challenges "the constitutional application of legislation to particular facts is required to raise that challenge at the first available opportunity during the proceedings before the administrative agency." *Bd. of Edn. of South-Western City Schools v. Kinney* (1986), 24 Ohio St.3d 184, 185-86, citing *Sun Finance & Loan Co. v. Kosydar* (1976), 45 Ohio St.2d 283, 284. Failure to fully exhaust administrative remedies by not requesting an administrative hearing, which

would provide the necessary opportunity to develop a factual record for consideration of the constitutional challenge on appeal, results in waiver of as applied constitutional challenges. *Derakhshan v. State Med. Bd. of Ohio*, 10th Dist. No. 07AP-261, 2007-Ohio-5802, ¶¶30-32. *Kinney* at 185-86, citing *Petrocon v. Kosydar* (1974), 38 Ohio St.2d 264 (noting that if a party does not raise an as applied constitutional challenge during the proceedings before the administrative agency, but instead asserts the as applied challenge at a later stage, it is "impossible to develop the factual record necessary for the resolution of the case").

{¶23} The exhaustion requirement applies also to a party seeking a declaratory judgment, with some exceptions. *Leslie v. Ohio Dept. of Dev.*, 171 Ohio App.3d 55, 2007-Ohio-1170, ¶62. Thus, even though exhaustion of administrative remedies is not necessary for a declaratory judgment that challenges the facial constitutionality of a statute, an as applied constitutional challenge must be raised, though not determined, before the administrative agency when administrative review is an option. See *Wilt v. Turner*, 8th Dist. No. 92707, 2009-Ohio-3904, ¶¶12-14, citing *Grossman v. Cleveland Heights* (1997), 120 Ohio App.3d 435, 441. See also *East Carroll Nursing Home v. Creasy* (May 3, 1984), 10th Dist. No. 83AP-247 (noting that while a declaratory judgment is appropriate when seeking to have a statute or rule declared unconstitutional, the nursing home here was instead asking "the court to interpret the applicable statutes and determine if the actions taken by defendants were lawful," which required exhaustion of administrative remedies).

{¶24} Here, with respect to its as applied challenge, Bartec could have requested an administrative hearing to contest the citations issued against it, at which point it could

have developed the facts necessary to its as applied constitutional challenge. Ohio Adm.Code 3701-52-08(F)(2). Of the ten underlying Smoke Free Act violations, Bartec did not request an administrative hearing or otherwise pursue administrative remedies for eight. Bartec requested an administrative hearing for two of the underlying citations that resulted in fines. Pursuant to R.C. 119.12, Bartec appealed those two adverse administrative decisions to the Franklin County Court of Common Pleas, which affirmed the administrative decisions that found violations and imposed fines. (Tr. 55, 56.) Bartec pursued no further appeals from those two violations. Bartec did not raise in any administrative hearing the constitutional issues it seeks to have determined at this time. Nor did it exhaust its administrative remedies for any of the violations. As a result, they all are final judgments. *New Richmond v. Byrne*, 12th Dist. No. CA2010-01-004, 2010-Ohio-4948.

{¶25} Because the ten orders finding violations are final, the trial court should not have entertained Bartec's collateral attack on them. See *Freedom Mtge. Corp. v. Mullins*, 10th Dist. No. 08AP-761, 2009-Ohio-4482, ¶17, n.1 (stating a court must dismiss an appeal filed "solely to collaterally attack an earlier, unappealed final judgment"); *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶22 (stating because "final judgments are meant to be just that—final," direct attack by appeal is the proper way to challenge a final judgment and "collateral or indirect attacks are disfavored"). The trial court erred as a matter of law in vacating Bartec's ten existing final violations of the Smoke Free Act. With that determination, we need not consider whether ODH actually adopted a policy of strict liability in enforcing the Smoke Free Act because the issue was not properly before the trial court.

{¶26} Although Bartec's argument included an assertion that the statute is unconstitutional on its face, the trial court refused to decide the issue in light of its other holdings. No purpose is served in remanding the matter to the trial court to consider the issue, as this court previously upheld the facial constitutionality of the Smoke Free Act. *Deer Park Inn*, supra.

{¶27} Accordingly, we sustain ODH's first and second assignments of error and conclude the trial court erred in vacating Bartec's ten existing violations.

#### **VI. ODH's Third Assignment of Error – Permanent Injunction**

{¶28} ODH's third assignment of error asserts the trial court erred in denying ODH's complaint seeking a statutory injunction against Bartec due to Bartec's repeated violations of the Smoke Free Act. ODH sought injunctive relief pursuant to R.C. 3794.09(D), which states "[t]he director of health may institute an action in the court of common pleas seeking an order in equity against a proprietor or individual that has repeatedly violated the provisions of this chapter or fails to comply with its provisions." ODH urges us to apply *Ackerman v. Tri-City Geriatric & Health Care* (1978), 55 Ohio St.2d 51 to the statutory injunction it seeks and to reject the equitable analysis typically associated with injunctions.

{¶29} In *Ackerman*, the Supreme Court of Ohio held "that when an injunction is authorized by statute, normal equity considerations do not apply, and a party is entitled to an injunction without proving the ordinary equitable requirements, upon a showing that the party has met the requirements of the statute for issuance of the injunction." *Hydrofarm, Inc. v. Orendorff*, 180 Ohio App.3d 339, 2008-Ohio-6819, ¶26, n.2, quoting *Procter & Gamble Co. v. Stoneham* (2000), 140 Ohio App.3d 260, 273-74 (Painter, J.,

concurring separately), cause dismissed (2001), 91 Ohio St.3d 1478, citing *Ackerman* at 56. Accordingly, this court has recognized "*Ackerman* clearly states that 'statutory injunctions should issue if the statutory requirements are fulfilled.'" *State ex rel. Scadden v. Willhite*, 10th Dist. No. 01AP-800, 2002-Ohio-1352 (noting "that statutory actions granting government agents the right to sue to enjoin activities deemed harmful by the General Assembly are not designed primarily to do justice to the parties but to prevent harm to the general public"), quoting *State ex rel. Pizza v. Rezcallah* (1998), 84 Ohio St.3d 116, 123, quoting *Ackerman* at 57.

{¶30} ODH characterizes R.C. 3794.09(D) primarily as a tool not to remedy injustice between the parties but to prevent harm to employees and the general public from violations of the Smoke Free Act. See R.C. 3794.04 (stating "it is in the best interests of public health that smoking of tobacco products be prohibited in public places and places of employment and that there be a uniform statewide minimum standard to protect workers and the public from the health hazards associated with exposure to secondhand smoke from tobacco"); see also *State ex rel. Brown v. Chase Foundry & Mfg. Co.* (1982), 8 Ohio App.3d 96 (finding that an injunction prescribed under R.C. 3704.06, through Ohio's implementation of the federal Clean Air Act, does not require a weighing of the equities because the General Assembly had already determined that illegal emissions into the air were worthy of injunctive relief). ODH thus argues it met the requirements of R.C. 3794.09(D) when it demonstrated Bartec incurred ten citations and did not pay any of its accumulated fines. According to ODH, the trial court, when presented with such facts, erred in not issuing the requested statutory injunction.

{¶31} Not all statutory injunctions fall within the *Ackerman* rule. See, e.g., *Hydrofarm* at ¶26, n.2, citing *Stoneham* at 274 (construing *State ex rel. Jones v. Hamilton Cty. Bd. of Commrs.* (1997), 124 Ohio App.3d 184, 189, appeal not allowed (1998), 81 Ohio St.3d 1457). Rather, the holding in *Ackerman* "is limited to those statutes that contain specific criteria that the court must use in determining entitlement to an injunction." *Stoneham*, supra. If "a statute merely provides that a party is entitled to injunctive relief as well as other types of relief, there is no 'statutory injunction' within the meaning of *Ackerman*, and the party requesting the injunction must use the general equitable principles governing the issuance of injunctive relief." *Id.*

{¶32} Here, we need not decide whether the injunctive relief contemplated in R.C. 3794.09(D) is a "statutory injunction" within the meaning of *Ackerman* with the evidence presented at the evidentiary hearing the trial court held, ODH demonstrated not only that it met the statutory requirements for an injunction but also that the equities supported the requested injunction. ODH presented the trial court with copies of the ten violations previously found against Bartec, eight of which were intentional. Bartec neither objected to the trial court's admitting the violations into evidence nor presented mitigating evidence suggesting the injunction should not issue. Rather, Bartec attempted to reargue the merits of ten underlying violations that already were final orders.

{¶33} On this record, the evidence is overwhelming that Bartec repeatedly and intentionally violated the Smoke Free Act, failed to comply with its provisions as R.C. 3794.09(D) requires, and in so doing exposed patrons and employees to the very harm the statute is designed to prevent. Due to the hearing the court conducted and the evidence adduced as a result of the hearing, the trial court could reach no other

conclusion than that ODH is entitled to the statutory injunction it requested. We thus sustain ODH's third assignment of error and remand with instructions to issue an injunction against Bartec pursuant to R.C. 3794.09(D).

## **VII. Bartec's First and Second Assignments of Error on Cross-Appeal – Declaratory and Injunctive Relief against ODH**

{¶34} In its first assignment of error, Bartec asserts the trial court erred in not declaring ODH's enforcement policies and practices under R.C. 3794.02 were unlawful. In its second assignment of error, Bartec contends the trial court erred in not granting its request for a permanent injunction that enjoins ODH from any further unlawful or unconstitutional enforcement of the Smoke Free Act. The trial court instead vacated the ten underlying citations which, it determined, rendered moot the need for such an injunction. Bartec's assignments of error reargue in different context many of the same issues addressed in ODH's first two assignments of error.

### **A. Declaratory Judgment**

{¶35} A declaratory judgment action is a civil action that provides a remedy in addition to other legal and equitable remedies available. *Aust v. Ohio State Dental Bd.* (2000), 136 Ohio App.3d 677, 681. "The essential elements for declaratory relief are (1) a real controversy exists between the parties, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties." *Walker v. Ghee*, 10th Dist. No. 01AP-960, 2002-Ohio-297, quoting *Aust* at 681. Whether to grant or deny declaratory relief is a matter within the sound discretion of the trial court. *State v. Brooks* (1999), 133 Ohio App.3d 521, 525, citing *Arbor Health Care Co. v. Jackson* (1987), 39 Ohio App.3d 183, 185. "A trial court properly dismisses a declaratory judgment action

when no real controversy or justiciable issue exists between the parties." *Id.*, citing *Weyandt v. Davis* (1996), 112 Ohio App.3d 717, 721.

{¶36} Here, Bartec brought an as applied challenge to the enforcement of the Smoke Free Act. See generally *Deer Park Inn*, *supra* (upholding Smoke Free Act over various constitutional challenges). The trial court should not have considered Bartec's as applied challenge to the enforcement of the Smoke Free Act, as Bartec wrongly attempted to use declaratory judgment as a means to collaterally attack the ten final orders finding violations against Bartec. Similarly, to the extent Bartec argues the trial court erred in not declaring the policies and procedures that ODH used in citing Bartec to be unlawful, Bartec's argument is unpersuasive. The trial court exceeded its authority both in vacating the ten existing violations and in ruling on ODH's past enforcement of the Smoke Free Act. Indeed, Bartec points to no authority, either case law or statutory, that suggests its request is an appropriate use of a declaratory judgment action.

{¶37} Instead, Bartec's argument invokes comparison to a defendant attempting to use a declaratory judgment action to attack a conviction that allegedly violated his or her rights. "A declaratory judgment action \* \* \* cannot be used as a substitute for an appeal or as a collateral attack upon a conviction." *Moore v. Mason*, 8th Dist. No. 84821, 2004-Ohio-1188, ¶14 (holding criminal defendant could not obtain declaratory judgment action against the prosecutor in his criminal case on argument that his sentence was unenforceable because the prosecutor and trial court allegedly violated his due process rights during his criminal trial). "Declaratory relief 'does not provide a means whereby previous judgments by state or federal courts may be reexamined, nor is it a substitute for appeal or post conviction remedies.' " *Id.*, quoting *Shannon v. Sequechi* (C.A.10, 1966),



365 F.2d 827, 829. *State v. Brooks* (1999), 133 Ohio App.3d 521, 525, citing *Carter v. Walters* (Mar. 22, 1990), 3d Dist. No. 11-88-24 (noting "[a] declaratory judgment action is not part of the criminal appellate process" because "[n]either [the declaratory judgment act] nor Civ.R. 57 convert[s] a claimed error at law by a trial judge acting as a judge in a criminal case into a justiciable controversy between the defendant and the judge subject to resolution by declaration"); see also *Moore* at ¶15.

{¶38} Like the defendant in *Moore*, Bartec is attempting to use a declaratory judgment action to attack the past methods of the entity charged with proving violations of a statute. As in *Moore*, "[t]his is not a justiciable controversy capable of resolution by declaration" under the declaratory judgment act. *Moore* at ¶16. To the contrary, it is an argument properly raised on appeal. *Id.* The holding in *Moore*, though rendered in a criminal case, is particularly apt here where testimony at the trial court indicated ODH investigates claimed violations of the Smoke Free Act on a case-by-case basis. (Tr. 44.) The declaratory relief Bartec sought is inappropriate.

#### B. Permanent Injunction

{¶39} A "party seeking a permanent injunction 'must demonstrate by clear and convincing evidence that [it is] entitled to relief under applicable statutory law, that an injunction is necessary to prevent irreparable harm, and that no adequate remedy at law exists.' " *McDowell v. Gahanna*, 10th Dist. No. 08AP-1041, 2009-Ohio-6768, ¶9, quoting *Acacia on the Green Condominium Assoc., Inc. v. Gottlieb*, 8th Dist. No. 92145, 2009-Ohio-4878, ¶18, citing *Stoneham* at 268. The decision whether to grant or deny an injunction is solely within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Id.*, citing *Danis Clarkco Landfill Co. v. Clark Cty.*

*Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 1995-Ohio-301, paragraph three of the syllabus.

{¶40} Bartec sought injunctive relief, in the event Bartec were to be charged with future violations of the Smoke Free Act, that would enable it prospectively to bypass any enforcement issues during the administrative appeals process provided under the statute. Injunctive relief, however, is appropriate only when the party seeking the injunction has no adequate remedy at law. See *McDowell* at ¶9. The administrative appeals process is an adequate remedy at law, albeit one Bartec has chosen not to pursue in the past. See *State ex rel. Natl. Emps. Network Alliance, Inc. v. Ryan*, 125 Ohio St.3d 11, 2010-Ohio-578, ¶1 (stating "[a]n administrative appeal generally constitutes an adequate remedy in the ordinary course of law"), citing *State ex rel. Hilltop Basic Resources, Inc. v. Cincinnati*, 118 Ohio St.3d 131, 2008-Ohio-1966, ¶23. Bartec's argument presents no need for a permanent injunction for any future attempts of ODH to enforce the Smoke Free Act against Bartec because Bartec may use the administrative appeals process to challenge the violation or argue the enforcement process itself is unlawful. Thus, regardless of any other deficiencies in Bartec's request for injunctive relief, Bartec has not demonstrated it has no adequate remedy at law.

{¶41} Based on the foregoing, Bartec is not entitled to either declaratory or injunctive relief against ODH. Thus, we overrule Bartec's first and second assignments of error on cross-appeal.

### **VIII. Bartec's Third Assignment of Error on Cross-Appeal – Permanent Injunction Against Attorney General**

{¶42} In its third assignment of error, Bartec asserts the trial court erred in failing to grant its request for a permanent injunction against the Attorney General. Bartec

argues that because the trial court vacated the underlying citations, the trial court should have granted Bartec a permanent injunction against the Attorney General that barred the Attorney General from attempting to collect any fines stemming from those citations.

{¶43} Because we concluded the trial court wrongly vacated the ten underlying valid violations, Bartec is not entitled to a permanent injunction against the Attorney General. Bartec's third and final assignment of error on cross-appeal is overruled.

### **IX. Disposition**

{¶44} In the final analysis, the trial court wrongly vacated Bartec's ten underlying violations of the Smoke Free Act, as those violations are valid, final orders. With that premise, the injunctive relief ODH seeks pursuant to R.C. 3794.09(D) against Bartec is proper. Bartec is not entitled to either declaratory or injunctive relief against ODH or against the Attorney General. Accordingly, we sustain ODH's three assignments of error, overrule Bartec's three assignments of error on cross-appeal, reverse the judgment of the Franklin County Court of Common Pleas, and remand with instructions to issue, in accordance with this decision, the injunction ODH requested.

*Judgment reversed and case  
remanded with instructions.*

TYACK, P.J., and SADLER, J., concur.

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