2012 WL 764425

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eleventh District, Lake County.

RIEBE LIVING TRUST, et al., Plaintiffs–Appellants,
v.
CONCORD TOWNSHIP, et al., Defendants–Appellees.

No. 2011–L–068.
|
Decided March 12, 2012.

Synopsis

Background: Owner, seeking to develop property into planned unit development, brought action challenging denial of application to have property rezoned. Township filed counterclaim, seeking declaration that senate bill, which amended statute governing scope of township zoning regulations, was unconstitutional. Parties moved for summary judgment. The Court of Common Pleas, Lake County, No. 07 CV 001143, denied owner's motion, and granted township's motion. Owner appealed.

Holdings: The Court of Appeals, Diane V. Grendell, J., held that:

[1] senate bill violated single subject rule, and

[2] owner did not have vested right for the law under the unconstitutional version to be applied.

Affirmed.

Mary Jane Trapp, J., concurred in judgment only and filed opinion.

West Headnotes (2)

[1] Statutes
Governments and political subdivisions

Zoning and Planning
Validity of statutes

Senate bill, which amended statute governing scope of township zoning regulations, violated single subject rule; each of the three main subjects included in bill had separate focuses and subject matter and had disunity of subject matter, and proposed connection between topics regarding statutory authority granted to communities was extremely broad and would essentially apply to any statute which regulated local governments. Const. Art. 2, § 15(C); R.C. § 519.02.

1 Cases that cite this headnote

[2] Zoning and Planning
Vested or property rights

Owner, seeking to have property it sought to develop into planned unit development rezoned, did not have vested right to pursue claim under senate bill amending statute governing scope of township zoning regulations, which was unconstitutional under single subject rule; owner did not make nonconforming use of property, and there was no intervening change in law that restricted owner from using property in a way owner had previously used it. Const. Art. 2, § 15(C); R.C. § 519.02.

Cases that cite this headnote

Civil Appeal from the Lake County Court of Common Pleas, Case No. 07 CV 001143.

Attorneys and Law Firms

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Opinion

DIANE V. GRENDELL, J.

***1** {¶ 1} Plaintiffs-appellants, Riebe Living Trust and 20th Century Construction Co. (collectively "appellants"), appeal the Judgment Entry of the Lake County Court of Common Pleas, in which the trial court denied appellants' Motion for Summary Judgment and granted defendant-appellee, Concord Township's, Motion for Summary Judgment. The issues to be determined by this court are whether Am.Sub.S.B. No. 18 is unconstitutional under the single subject rule and, even if such legislation is unconstitutional, whether an appellant has a vested right for the law under the unconstitutional version to be applied. For the following reasons, we affirm the decision of the court below.

{¶ 2} Riebe owns approximately 167 acres of property in Concord Township, which appellants sought to develop into a planned unit development. In December of 2005, appellants filed an application with the Concord Township Zoning Department to have the property rezoned from R–4 residential to R–1 residential, which would allow appellants to have more units within the development. This application was subsequently denied.

{¶ 3} On April 20, 2007, appellants filed a Complaint and Writ of Mandamus against Concord Township, the Concord Township Board of Trustees, and the Concord Township Zoning Commission (collectively "Concord"). Appellants alleged that the denial of the rezoning request was arbitrary and unreasonable because the denial had no substantial relation to public health or safety, as required by R.C. 519.02. They requested a declaratory judgment that the zoning classification was unconstitutional and constituted a taking of the property.

{¶ 4} Concord filed its Answer on June 26, 2007. On June 27, 2008, Concord sought leave to amend the Answer and file a Counterclaim, seeking a declaration that Am.Sub.S.B. No. 18, which amended R.C. 519.02, was unconstitutional. Concord asserted that prior to the enactment of S.B. 18, townships could regulate land use in the interests of public health, safety, convenience, comfort, prosperity, and general welfare, but under the amended bill could regulate only in the interest of public health and safety. Therefore, Concord sought a declaration that S.B. 18 was unconstitutional and that the prior version of R.C. 519.02 should be applied. The trial court granted Concord leave to amend its Answer on June 30, 2009.

{¶ 5} S.B. 18 was originally introduced and considered in the Senate on January 30, 2003. The bill proposed to revise only R.C. 3735.27, a statute related to the composition of metropolitan housing authorities. This bill was subsequently amended with minor changes and introduced in the House of Representatives on April 2, 2003. No further action was taken on the legislation until December 8, 2004, when the House added several provisions amending four existing statutes, including R.C. 303.02, 303.161, 519.02, and 519.171, statutes regarding the purposes and scope of county and township zoning regulations, and enacting R.C. 3313.537, a statute regarding the participation of charter school students in extracurricular activities at public schools. The House approved the bill on December 8, and on December 9, 2004, the bill was accepted by the Senate as amended by the House.

***2** {¶ 6} On January 22, 2010, Concord filed a Motion for Summary Judgment on its Counterclaim, asserting that there was no genuine issue of material fact as to the unconstitutionality of S.B. 18. On January 25, 2010, appellants filed a Motion for Summary Judgment on their claims, asserting that S.B. 18 is constitutional and that Concord improperly denied appellants' request for rezoning, by failing to advance a legitimate "public health and safety interest" on which the denial was based.

{¶ 7} The trial court issued an Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment on April 26, 2010. The trial court found that S.B. 18 amended various Ohio Revised Code sections and that the sections "cover topics ranging from regulation of building and land use in counties and townships, the composition of boards of trustees for metropolitan housing authorities in charter counties, and the right of students in charter schools to participate in extracurricular activities in public schools," and that these topics "lack a common purpose or relationship, and that there is no discernible practical, rational, or legitimate reason for combining the provisions." The court also found that the three-readings rule, found in Article II, Section 15(C) of the Ohio Constitution, was violated in passing the bill. The trial court granted summary judgment in favor of Concord

on its Counterclaim for Declaratory Judgment and found that the appellants were not entitled to summary judgment on their claim because genuine issues of material fact remained.

{¶ 8} On May 13, 2010, appellants filed their initial Notice of Appeal. On December 6, 2010, this court dismissed the appeal for a lack of a final appealable order. The trial court subsequently issued an Order amending the April 26, 2010 Judgment Entry to include the following language: "Pursuant to Civ.R. 54, the court finds no just reason for delay."

{¶ 9} Appellants timely appeal from the amended Judgment Entry and raise the following assignment of error:

{¶ 10} "The trial court erred to the prejudice of Plaintiff[s]-Appellant[s] in granting Summary Judgment to Defendants–Appellees."

{¶ 11} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "the moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence * * * that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party's favor."

{¶ 12} A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision. *Brown v. Cty. Commrs. of Scioto Cty.,* 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

***3 [1]** {¶ 13} Appellants first argue that the lower court incorrectly found S.B. 18 unconstitutional and to be a manifestly gross and fraudulent violation of the Ohio Constitution because the topics of the bill share a common core that complies with the one subject rule.

{¶ 14} In general, statutes enjoy a strong presumption of constitutionality. *State v. Cook,* 83 Ohio St.3d 404, 409, 700 N.E.2d 570 (1998) ("[a] regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality") (citation omitted). Before a court may declare a legislative enactment unconstitutional, "it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." (Citation omitted.) *Id.*

{¶ 15} Article II, Section 15(D) of the Ohio Constitution provides that "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title." "[A] subject for purposes of the one-subject rule is to be liberally construed as a classification of significant scope and generality. * * * [T]he term 'subject' within such constitutional provisions is to be given a broad and extensive meaning so as to allow [the] legislature full scope to include in one act all matters having a logical or natural connection." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St.3d 451, 498, 715 N.E.2d 1062 (1999). "However, this principle does not extend to give the General Assembly such latitude as to include in one act blatantly unrelated matters." *Id.*

{¶ 16} "The one-subject provision attacks logrolling by disallowing unnatural combinations of provisions in acts, i.e., those dealing with more than one subject, on the theory that the best explanation for the unnatural combination is a tactical one-logrolling." *State ex rel. Dix v. Celeste,* 11 Ohio St.3d 141, 143, 464 N.E.2d 153 (1984). "[T]he one-subject provision does not require evidence of fraud or logrolling beyond the unnatural combinations themselves. Instead, 'an analysis of any particular enactment is dependent upon the particular language and subject matter of the proposal,' rather than upon extrinsic evidence of logrolling, and thus 'an act which contains such unrelated provisions must necessarily be held to be invalid in order to effectuate the purposes of the rule.' " *In re Nowak,* 104 Ohio St.3d 466, 2004–Ohio–6777, 820 N.E.2d 335, ¶ 71, citing *Dix* at 145, 464 N.E.2d 153; *Simmons–Harris v. Goff,* 86 Ohio St.3d 1, 16, 711 N.E.2d 203 (1999) ("where there is a blatant disunity between topics and no rational reason for their combination can be discerned, it may be inferred that the bill is the result of logrolling").

{¶ 17} We initially note that the issue of whether S.B. 18 violates the one subject provision has previously been considered. In *Akron Metro. Hous. Auth. Bd. of Trustees v. Ohio,* the Tenth District held that "a blatant disunity of subject matter exists in [Am. Sub.S.B. No. 18]," as the bill contains three unrelated topics, "(1) an alteration in the composition of boards of trustees of metropolitan housing authorities situated in charter counties, (2) changes in the purposes and scope of county and township zoning regulations, and (3) the creation of a right for charter school students to participate in extracurricular activities at traditional public schools." *Id.* at ¶ 20, 23, 711 N.E.2d 203. The court held that since the "disunity of subject matter strongly suggests the bill's disparate provisions were combined for the tactical reason of logrolling, Am.Sub.S.B. No. 18 is a manifestly gross and fraudulent violation of the one-subject rule of Section 15(D), Article II of the Ohio Constitution." *Id.* at ¶ 24, 711 N.E.2d 203.

***4** {¶ 18} Appellants argue that a common thread exists between the topics such that the bill does not violate the single subject rule. They assert that the connection between the subjects in the bill is that they all relate to "the authority to monitor a community as granted by state statute."

{¶ 19} A reading of the separate provisions shows no unity of subject matter. The zoning provisions, which generally deal with the interests allowed to be considered in denying zoning requests, appear to be entirely unrelated to the ability of charter school students to be allowed to participate in public school extracurricular activities. In addition, the provisions under R.C. 3735.27 deal with the composition of metropolitan housing authorities, not with any regulation of individuals or zoning regulations. Each of the three main subjects included in the bill have separate focuses and subject matter and, as noted by the *Akron* court, have a "blatant disunity of subject matter."

{¶ 20} In addition, the proposed connection between the topics presented by appellants regarding the statutory authority granted to communities is extremely broad and would essentially apply to any statute which regulated local governments. Courts have neglected to accept "overly broad" rationales regarding the unity of topics under the single subject rule. *Nowak,* 104 Ohio St.3d 466, 820 N.E.2d 335, 2004–Ohio–6777, at ¶ 61 (the argument that a bill's topics all dealt with individuals' ownership interest in both real and personal property was overly broad and rejected as a rationale for combining the topics in a bill) (citation omitted); *Akron,* 10th Dist. No. 07AP–738, 2008–Ohio–2836, at ¶ 21. In *Akron,* the court rejected a similar rationale presented, that the topics within the bill were tied together by the common theme of "modifying local authority," accepting the trial court's reasoning that such an argument was "far too vague, * * * as almost any bill will modify local authority at least to some degree." *Id.*

{¶ 21} Moreover, even if this rationale were not overbroad, we note that R.C. 3735.27 deals specifically with establishing the composition of metropolitan housing authorities and which members may be appointed. This does not actually deal with the issue of the authorities' ability to monitor the community, again calling into question the appellants' rationale for combining the various topics in S.B. 18.

{¶ 22} Based on the foregoing, we find that S.B. 18 violates the single subject rule and, therefore, is unconstitutional.

{¶ 23} Appellants also argue that both the trial court and the court in *Akron* relied on extrinsic evidence to determine that S.B. 18 had disunity of subject matter, and such extrinsic evidence should not be taken into consideration when finding the bill to be unconstitutional.

{¶ 24} In *Akron,* the Tenth District stated that "[t]he record suggests no rational reason for combining such distinct provisions into one bill except that, when the bill contained only the proposed revisions to R.C. 3735.27, the bill was stalled for 20 months until the other provisions were included; then the amended bill proceeded immediately to a vote and approval." 10th Dist. No. 07AP–738, 2008–Ohio–2836, at ¶ 24. The trial court adopted similar reasoning. However, even in absence of this fact, the court still found blatant disunity in the subject matter of the bill. *Id.* As we have also found that there is blatant disunity between the provisions by merely reviewing the text of the bill, we need not consider extrinsic evidence or make a finding as to the appropriateness of relying on such evidence. A review of the language of the bill itself is sufficient to find that there is disunity.

***5** {¶ 25} Appellants next assert that, even if S.B. 18 and the accompanying changes to R.C. 519.02 were unconstitutional, such an argument is moot, since the Legislature has since amended R.C. 519.02. Appellants assert that since the statute has been amended properly,

without any constitutional defects, the entire statute is constitutional. We disagree.

{¶ 26} Subsequent to the enactment of S.B. 18, the Legislature amended R.C. 519.02 in August of 2006, through H.B. 23. This amendment included an additional section, section (B), which related to the zoning of adult entertainment establishments. The amendment did not make any changes to the portion of the statute amended by S.B. 18, regarding the interests of zoning regulations, except to label the section "(A)."

{¶ 27} Although appellants contend that the inclusion of the language restating the provisions improperly enacted by S.B. 18 renders moot the challenge to the constitutionality of S.B. 18, this argument has been rejected by other courts when the statute is merely amended and the statute is not a reenactment of the original legislation. *United Auto Workers, Local Union 1112 v. Brunner,* 182 Ohio App.3d 1, 2009–Ohio–1750, 911 N.E.2d 327, ¶ 35 (10th Dist .); *Stevens v. Ackman,* 91 Ohio St.3d 182, 194–195, 743 N.E.2d 901 (2001). In *Brunner,* the court noted that "[a]ny unchanged language in the pertinent sections is reproduced and appears as ordinary text," and found that since the language from the unconstitutional bill had not been altered or marked in any way in the new bill, the relevant portion was not reenacted or readopted. *Id.* at ¶ 29, 911 N.E.2d 327; *Stevens* at 194–195, 743 N.E.2d 901 ("where an act is amended, the part of the original act which remains unchanged is to be considered as having continued in force as the law from the time of its original enactment, and new portions as having become the law only at the time of the amendment. * * * '[B]y observing the constitutional form of amending a section of a statute, the Legislature does not express an intention then to enact the whole section as amended, but only an intention then to enact the change which is indicated.' ") (citation omitted). In the present case, the original language amended by S.B. 18 was included in H.B. 23, but was not changed, underlined, or stricken through, and, therefore, no intent was expressed to reenact that portion of the statute.

{¶ 28} In addition, H.B. 23 stated that it amends, rather than enacts, the language of R.C. 519.02. Thus, this expresses the intent of the legislature to simply make the addition to section (B), as underlined, not to completely reenact the entire language of the statute. *Stevens* at 194–195, 743 N.E.2d 901 (where the language of the bill states that it amends, not enacts, the language of the statute and the language of the prior bill is merely reproduced as to the pertinent sections, it is not newly enacted statutory language).

{¶ 29} Since the Legislature did not enact or reenact the pertinent portions of R.C. 519.02 in H.B. 23, the unconstitutionality of S.B. 18 is not moot in this case. *Brunner* at ¶ 34 ("even if [the Legislature] intends the ordinary text in an otherwise-amending statute to be a recognition of existing prior law, any infirmity in enacting that prior law is not remedied by the subsequent amending statute") (citation omitted).

***6** {¶ 30} Appellants assert that the trial court improperly found that S.B. 18 is also unconstitutional due to a violation of the three readings rule. However, as we have already found S.B. 18 to be unconstitutional, this argument is moot.

[2] {¶ 31} Appellants next argue that even if S.B. 18 is unconstitutional, Concord cannot evaluate their rezoning application under the post-*Akron* analysis because they have vested rights under the existing law. Appellants rely on *Negin v. Bd. of Bldg. & Zoning Appeals,* 69 Ohio St.2d 492, 433 N.E.2d 165 (1982), and assert that the vesting of a property right is recognized at the time that an application for a particular use is filed. Essentially, appellants assert that even if S.B. 18 is unconstitutional, their application for rezoning occurred prior to any finding of unconstitutionality, and the rezoning request should be considered under the "public health and safety" standard found in R.C. 519.02 as amended by S.B. 18.

{¶ 32} Concord argues that appellants have no vested right and *Negin* is inapplicable, since in that case, the party had a valid, vested nonconforming use prior to the passing of a new law eliminating that use.

{¶ 33} "An unconstitutional statute is not a law, confers no rights, imposes no duties, affords no protection, creates no office, and, in legal contemplation, is as inoperative as though it had never been passed." *Roberts v. Treasurer,* 147 Ohio App.3d 403, 411, 770 N.E.2d 1085 (10th Dist.2001), citing *Primes v. Tyler,* 43 Ohio St.2d 195, 196, 331 N.E.2d 723 (1975) (citation omitted). Although appellants assert that the law prior to the amendment of R.C. 519.02 should not apply to the application for rezoning, if a statute is unconstitutional, it is inoperative,

thereby leaving the former law in full force and effect. *McClain v. All States Life Ins. Co.,* 82 Ohio App. 354, 358, 80 N.E.2d 815 (1st Dist.1948); *Brunner,* 182 Ohio App.3d 1, 911 N.E.2d 327, 2009–Ohio–1750, at ¶ 25–27 (since the bill was found to be unconstitutional, it was not the law of Ohio and could not be applied to the case before the court); *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State Emp. Relations Bd.,* 152 Ohio App.3d 551, 2003–Ohio–2021, 789 N.E.2d 636, ¶ 30–31 (10th Dist.) (where a portion of a bill was severed due to unconstitutionality, it was not the law, and thus, was not applicable to determine the rights of the parties).

{¶ 34} However, an unconstitutional statute may create rights for a party if that party has acquired vested rights under the law. *Roberts* at 411, 770 N.E.2d 1085. A vested right is one that "so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent." (Citation omitted.) *Harden v. Ohio Atty. Gen.,* 101 Ohio St.3d 137, 2004–Ohio–382, 802 N.E.2d 1112, ¶ 9; *State ex rel. Jordan v. Indus. Comm. of Ohio,* 120 Ohio St.3d 412, 2008–Ohio–6137, 900 N.E.2d 150, ¶ 9 (a right cannot be characterized as vested "unless it constitutes more than a 'mere expectation or interest based upon an anticipated continuance of existing laws' ") (citations omitted).

***7** {¶ 35} Appellants rely on *Negin to* support the assertion that the vesting of a property right is recognized at the time an application for a use is filed.

{¶ 36} We find that *Negin* is not applicable to the present case and that appellants do not have a vested right. In *Negin,* the court found that the owner of land had already developed it for a certain use before a change in the zoning law made that use impossible, and found a nonconforming use. *Negin,* 69 Ohio St.2d 492, 496, 433 N.E.2d 165. "A nonconforming use is a lawful use of property in existence at the time of enactment of a zoning resolution which does not conform to the regulations under the new resolution." *Aluminum Smelting & Refining Co. v. Denmark Twp. Zoning Bd. of Zoning Appeals,* 11th Dist. No.2001–A–0050, 2002–Ohio–6690, ¶ 14. In the present matter, appellants did not make a nonconforming use of the property, as they were not making a prior, lawful use of the property as R–1 but had only applied for rezoning. As explained by the trial court, "[t]his case does not involve an intervening change in law that restricted the [appellants'] use of the property. * * * The change was an invalid amendment restricting the statutory grant of authority to the township to regulate the land use within the township." Unlike in *Negin* and similar cases, there was no intervening change in law that restricted appellants from using the property in a way they had previously used it and thus, no vesting occurred. Appellants can point to no evidence to support a finding that they had more than a "mere expectation" that amended R.C. 519.02 would apply in their case and they have no right to such application of an unconstitutional law.

{¶ 37} Appellants argue that to find they did not have vested rights under the present version of R.C. 519.02 constitutes an unconstitutional taking of their property.

{¶ 38} We note that it is unnecessary to determine whether the failure of Concord to grant the rezoning request constitutes a taking because the denial of this request was not the subject of the Counterclaim on which summary judgment was granted. That issue has not yet been decided by the trial court. Instead, appellants again assert that they have a vested right to the application of the unconstitutional law. They cite no law supporting this proposition, but instead cite law regarding the actual deprivation of certain uses of property. Moreover, since the law does not grant appellants any vested rights, as discussed above, there can be no illegal taking of such rights. *See Brunner,* 182 Ohio App.3d 1, 911 N.E.2d 327, 2009–Ohio–1750, at ¶ 25–27 (where a law is unconstitutional, it does not create rights for the party seeking to apply the law).

{¶ 39} Appellants finally argue that throughout the trial court proceedings, the parties prosecuted the matter under the amended version of R.C. 519.02 and the township's witness admitted that "public health and safety" were the only zoning considerations permitted by statute. The appellants argue that because the parties proceeded in the lower court as though the amended version of R.C. 519.02 under S.B. 18 was constitutional, it would be improper to now find the statute unconstitutional and prevent the appellants from pursuing their claim under the statute as amended.

***8** {¶ 40} However, the record indicates that while initially Concord did not argue that S.B. 18 was unconstitutional, on June 27, 2008, Concord sought leave to amend their Answer and file a Counterclaim, regarding the unconstitutionality of S.B. 18, which was granted by

the court. Both parties subsequently filed Motions for Summary Judgment and appellants also filed a response to Concord's Motion for Summary Judgment, where it addressed the issue of the constitutionality of S.B. 18. Both parties were able to adequately present their arguments regarding this issue. Therefore, the Motion for Summary Judgment on the Counterclaim was properly before the court and applicable to the case. In addition, although appellants assert that they have a vested right to pursue their claim under S.B. 18, as we have already noted, they have failed to prove the existence of such a vested right.

{¶ 41} For the foregoing reasons, the Judgment Entry of the Lake County Court of Common Pleas, denying appellants' Motion for Summary Judgment and granting Concord's Motion for Summary Judgment, is affirmed. Costs to be taxed against appellants.

CYNTHIA WESTCOTT RICE, J., concurs.

MARY JANE TRAPP, J., concurs in judgment only with a Concurring Opinion.

MARY JANE TRAPP, J., concurs in judgment only with a Concurring Opinion.

{¶ 42} While I concur with the majority's analysis regarding the unconstitutionality of Am.Sub.S.B. 18 and the "vested right" issues raised in this appeal, I write separately as I would have dismissed this appeal once again for lack of a final, appealable order. I fear that future parties may look to this case and cite it as authority for an interlocutory appeal.

{¶ 43} When this case was first appealed in Appeal Number 2010–L–050, we questioned whether there was a final, appealable order and ordered the parties to submit briefs addressing this court's jurisdiction. No briefs were filed; the appeal was dismissed; and the trial court simply added Civ.R. 54(B) language to its entry.

{¶ 44} If only the addition of such language could cure an "FAO" issue, the recurring and thorny question of when an interlocutory appeal may be taken would be much easier to answer for litigants and courts alike. It does not get any easier when the interlocutory order is made in a special proceeding such as a declaratory judgment action. Although it may seem counterproductive at times to decide that in most instances an order disposing of some but not all claims or parties is not ripe for appeal, we may not simply look the other way when we (or for that matter the parties) want an answer on one question now rather than later. The reasoning behind our "FAO" jurisprudence is to move a case to a *final* conclusion rather than delay that final conclusion by allowing multiple appeals of single questions as they are determined by the trial court.

{¶ 45} An order must be final before it can be reviewed by an appellate court. An appellate court has no jurisdiction to review an order that is not final. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.,* 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989). "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 within 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." *Id.* at 21, 540 N.E.2d 266.

***9** {¶ 46} "Declaratory judgment actions are a special remedy not available at common law or at equity." *Id.,* at 22, 540 N.E.2d 266. R.C. 2505.02(B)(2) provides: "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is * * * [a]n order that affects a substantial right made in a special proceeding * * *. A 'special proceeding' is 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." R.C. 2505.02(A)(2).

{¶ 47} At first blush it would appear that the trial court's order was a final order because it was entered in a declaratory judgment action, and after the trial court added a Civ.R. 54(B) certification, the order became final and appealable, despite the fact that there were other pending claims.

{¶ 48} However, as the Supreme Court of Ohio explained in *Walburn v. Dunlap,* 121 Ohio St.3d 373, 904 N.E.2d 863, 2009–Ohio–1221, the analysis does not end with these conclusions as the question of whether the order affects a substantial right for purposes of R.C. 2505.02(B)(2) remains unanswered. The court observed that since the court's decision in *Gen. Acc., supra,* R.C. 2505.02(A)(1) has been added to define "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."

{¶ 49} While the entry before us may *implicate* a substantial right, it does not *affect* a substantial right. *See* Painter & Pollis, *Ohio Appellate Practice,* Section 2.5, at 42 (2011). "An order which affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future." *Bell v. Mt. Sinai Hosp.,* 67 Ohio St.3d 60, 63, 616 N.E.2d 181 (1993). Simply applying that concept to the order before us, the trial court's order only determined which zoning law is to be applied to the facts of this case; it did not finally determine whether the plaintiffs were entitled to the relief sought under the version of the law found by the trial court to apply.

{¶ 50} The trial court's order gave Concord Township the relief sought in its counterclaim, that is, a declaration that Am.Sub.S.B. 18 was unconstitutional, but the court specifically did not dispose of the remaining claims *against* the township by an application of the law to the facts. Simply put, the trial court had competing versions before it, and in its order chose one; that order accomplished nothing more, nothing less.

{¶ 51} In my opinion this renders the order interlocutory. I cannot view the resultant "taking" claim and claims for damages and attorney fees asserted by the plaintiffs as distinct claims that may be severed from the other claims pursuant to Civ.R.54(B).

All Citations

Slip Copy, 2012 WL 764425, 2012 -Ohio- 981

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