

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO EX REL. RICHARD :
CORDRAY, ATTORNEY GENERAL,

APPEAL NO. C-090255
TRIAL NO. A-0603011

Relator-Appellant,

JUDGMENT ENTRY.

vs.

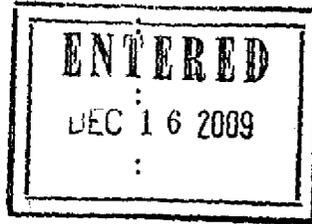
MASS REALTY, LLC,

Respondent-Appellee,

and

JEFFREY J. ROBINSON,

Respondent.

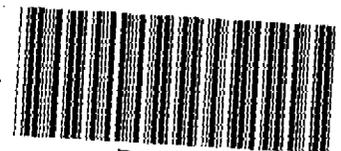


We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Relator-appellant, Richard Cordray, the Ohio Attorney General, filed a complaint against respondent-appellee, Mass Realty, LLC, and Jeffrey Robinson, its president. The causes of action related to Mass Realty's alleged breach of orders issued by the Ohio Environmental Protection Agency ("EPA") in 2001 to remediate water pollution on a site Mass Realty had purchased. Cordray sought an injunction ordering Mass Realty to comply with the 2001 orders, civil penalties, and recovery of costs.

The trial court found in favor of Robinson on all claims against him. As to Cordray's claim for injunctive relief against Mass Realty, the court stated, "Mass Realty is ordered to continue testing and to comply with the 2001 orders. Should

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.



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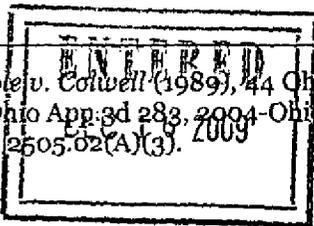
Mass Realty comply with the 2001 Orders, no penalties will be assessed against it. If Mass Realty fails to comply with the 2001 orders, penalties will be awarded to [Cordray].” The court found in favor of Mass Realty on all of Cordray’s remaining claims. He has filed a timely appeal from that judgment.

Cordray sets forth two assignments of error for review. But we cannot reach the merits of those assignments of error because we hold that the order from which Cordray has appealed is not a final, appealable order. We, therefore, are without jurisdiction to hear the appeal.

To constitute a final, appealable order, a judgment must meet the requirements of R.C. 2505.02 as well as Civ.R. 54(B), if applicable.² In this case, Cordray has appealed that part of the order relating to civil penalties. The court ordered Mass Realty to comply with the EPA’s previous orders regarding testing but expressly deferred the issue of civil penalties, both past and future, to a later date. In one of his assignments of error, Cordray contends that the court erred in failing to award civil penalties for past violations of the orders. But the court stated that it would award penalties for past violations if Mass Realty did not comply with the 2001 orders in the future.

R.C. 2505.02(B)(2) defines a final order as “an order that affects a substantial right in a special proceeding.” A special proceeding is “an action or proceeding that is especially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.”³ Cordray filed this action under R.C. Chapter 3945, which gives the director of the EPA authority to enforce the laws governing pollution. This action is specially created by statute and did not exist prior to 1853. Therefore, it is a special proceeding.

² *Noble v. Conwell* (1989), 44 Ohio St.3d 92, 540 N.E.2d 1381; *Othman v. Heritage Mut. Ins. Co.*, 158 Ohio App.3d 283, 2004-Ohio-4361, 814 N.E.2d 1261.
³ R.C. 2505.02(A)(3). 2009



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The question becomes then whether the order affected a substantial right in a special proceeding. An order affects a substantial right if "in the absence of an immediate appeal, it forecloses appropriate relief in the future."⁴

The order relating to civil penalties does not affect a substantial right because the trial court expressly deferred a ruling on the issue. It is still pending; it leaves issues unresolved and contemplates that the court will take further action.⁵ Cordray will not be denied appropriate relief in the future if the order is not immediately appealable. Consequently, the order relating to civil penalties does not affect a substantial right in a special proceeding, and it is not a final order within the meaning of R.C. 2505.02(B).

Cordray also appeals that part of the trial court's order expressly denying his claim for response costs. In its findings of fact and conclusions of law, the court stated, "As a creature of statute, the Ohio EPA has only such authority as is conferred upon it by the General Assembly. EPA may not recover Response Charges from Defendants." In the judgment entry, the court found in favor of Mass Realty on all of Cordray's claims but the claims for injunctive relief and civil penalties.

Thus, the court specifically decided that issue.⁶ The part of the order relating to response costs affects Cordray's right on behalf of the state to recover those costs. Therefore it affects a substantial right in a special proceeding, and it is a final order within the meaning of R.C. 2505.02(B).

Even though that part of the order is final under R.C. 2505.02, the judgment appealed from adjudicates one or more but fewer than all of the claims or the rights

⁴ *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 616 N.E.2d 181, modified on other grounds, *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 1994-Ohio-324, 635 N.E.2d 331; *Patel v. Nilvi*, 8th Dist. No. 88624, 2007-Ohio-3082; *Corbitt v. State Farm Mut. Automobile Ins. Co.*, 10th Dist. No. 03AP-897, 2004-Ohio-1011.

⁵ See *McCall v. Sexton*, 4th Dist. No. 06CA12, 2007-Ohio-3082; *State ex rel. Internatl. Assn. of Firefighters, Local 381, AFL-CIO, v. Findlay*, 3rd Dist. No. 5-05-21, 2006-Ohio-1774. Compare *Worley v. Cincinnati* (Aug. 25, 2000), 1st Dist. No. HC990506.

⁶ See *Internatl. Assn. of Firefighters*, supra.

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and liabilities of fewer than all of the parties. Therefore, it must meet the requirements of Civ.R. 54(B) to be appealable.⁷

Civ.R. 54(B) requires the trial court to make an express determination that "there is no just reason for delay" before it can enter a final judgment.⁸ The rule's general purpose is to "accommodate the strong policy against piecemeal litigation with the possible injustice of delayed appeals in special situations."⁹ In this case, the court did not make that determination or include the appropriate language in the entry.

Since the judgment from which Cordray has appealed did not meet the requirements of R.C. 2505.02 and Civ.R. 54(B), it is not a final, appealable order.¹⁰ Consequently, we are without jurisdiction to entertain the appeal, and we, therefore, dismiss it.¹¹

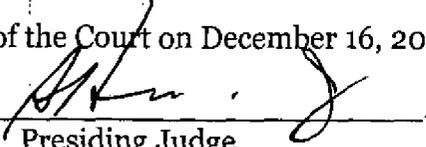
A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., CUNNINGHAM and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on December 16, 2009

per order of the Court _____


Presiding Judge

⁷ *Noble, supra*; *Wiley v. Good Samaritan Hosp.*, 1st Dist. Nos. C-030131 and C-030181, 2004-Ohio-763.

⁸ *Noble, supra*; *State ex rel. Dann v. Naypaver*, 11th Dist. No. 2007-T-0125, 2008-Ohio-1659; *Ramudit v. Fifth Third Bank*, 1st Dist. No. C-030941, 2005-Ohio-374, amended on other grounds by 2005-Ohio-978.

⁹ *Noble, supra*; *Ramudit, supra*.

¹⁰ See *Naypaver, supra*.

¹¹ *State ex rel. A & D Ltd. Partnership v. Keefe*, 77 Ohio St.3d 50, 1996-Ohio-95, 671 N.E.2d 13; *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 540 N.E.2d 266; *Dater v. Charles H. Dater Foundry, Inc.*, 166 Ohio App.3d 839, 2006-Ohio-2479, 853 N.E.2d 699.

ENTERED

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