

Court of Appeals Case No. 10-094856

IN THE COURT OF APPEALS OF OHIO
Eighth Appellate Judicial District, Cuyahoga County

ROBERT SCHMIDT,
Individually and on behalf of all others similarly situated,
Appellee-Plaintiff

v.

AT&T, INC. and SBC INTERNET SERVICES, INC.
d/b/a/ AT&T INTERNET SERVICES,
Appellees-Defendants

Appeal of GAIL FORD and CARRIE A. DUNNE,
Appellants-Proposed Intervenors

On Appeal from Cuyahoga County Court of Common Pleas
Case No.: CV 2009 688788

DEFENDANTS' MOTION TO DISMISS APPEAL
FOR LACK OF APPELLATE JURISDICTION

Gail Ford and Carrie Dunne are attempting to appeal from an order denying their motion to intervene in a nationwide class action, which has been settled and is awaiting a final approval hearing that will be held on June 1, 2010. Ford and Dunne may object to the settlement at the fairness hearing if they do not opt out of the class.

Under these circumstances, for the reasons explained below, the order denying them leave to intervene is not final and appealable under R.C. § 2505.02. Most notably, the Ohio Supreme Court has held in two recent decisions that orders denying intervention are *not*

immediately appealable under § 2505.02. *Gehm v. Timberline Post & Frame*, 112 Ohio St. 3d 514, 2007–Ohio–607, 861 N.E.2d 519 (trial court order denying intervention); *State ex rel. Sawicki v. Court of Common Pleas*, 121 Ohio St. 3d 507, 2009–Ohio–1523, 905 N.E.2d 1192 (court of appeals order denying intervention). Accordingly, defendants AT&T, Inc. and SBC Internet Services, Inc. d/b/a/ AT&T Internet Services (collectively, “AT&T”) move to dismiss this appeal for lack of appellate jurisdiction.

Background

Plaintiff Robert Schmidt filed this case on March 31, 2009, alleging on behalf of a putative nationwide class that AT&T failed to provide its Internet customers with the DSL speed required by contract. In November 2009, the parties conducted mediation under the guidance of James J. McMonagle, an experienced mediator and former judge. With the mediator’s assistance, the parties reached a final, formal settlement agreement, and on December 21, 2009, the trial court entered an order preliminarily approving the settlement as fair, reasonable, and adequate.

That order conditionally certified a nationwide class of all persons who purchased DSL service from AT&T in the last 16 years, designated Schmidt as the settlement class representative, and appointed Schmidt’s counsel as settlement class counsel. Order Preliminarily Approving Settlement (“Preliminary Approval Order”), ¶¶ 4-8 (Ex. 1). The Court set June 1, 2010 as the date for the final approval hearing, required class members to submit objections to the settlement at least 30 days before that hearing, and stated that any class member who does not opt out shall have the right to appear and be heard at the final approval hearing. *Id.* ¶¶ 9, 19. The Court further provided that a class member who wished to opt out of the class could do so by submitting a written request for exclusion, which also must be submitted at least 30 days before the June 1 hearing. *Id.* ¶¶ 14, 16. In accordance with the Preliminary Approval Order, all

class members were notified in March 2010 of the settlement and their rights to object or opt out. *Id.* ¶ 11; Affidavit of David Becker ¶ 4 (Ex. 2); Affidavit of Scott Fenwick ¶¶ 3-4, 6 (Ex. 3).

The appellants in this Court, Ford and Dunne, have been serving since 2009 as the named plaintiffs in another putative class action against AT&T in Missouri state court, *Ford and Dunne v. SBC Commc'ns.*, No. 06CC-003325 (St. Louis County, Mo.), which was filed originally in 2005. That case is much narrower in scope than the Ohio case: it alleges a narrow subset of the claims alleged in this case (covering only one of AT&T's tiers of DSL service) and involves a narrow subset of the class members present in this case (only customers who live in Missouri, Arkansas, Oklahoma, Texas, and Kansas). The trial court's Preliminary Approval Order recognized that settlement of this broader case would include the Missouri claims, and ordered that "[n]otice shall be provided to Settlement Class Members in the five states at issue in the *Ford and Dunne* Case in the same manner as that provided to all other Settlement Class Members." Preliminary Approval Order ¶ 15.

Counsel for Ford and Dunne learned of this litigation and the trial court's preliminary approval order by December 23, 2009. Mot. to Intervene at 5 (Ex. 4). More than five weeks later, on January 29, 2009, they moved to intervene in this case. Ford and Dunne's motion asserts that they should be permitted to intervene to oppose the proposed settlement as "unfair and inadequate" because the compensation for each class member is too low and the settlement purportedly provides no injunctive relief; Ford and Dunne also object to the attorneys' fees and charitable contributions provided for in the settlement, as well as to the claim form that class members will submit. *Id.* at 8. The proposed complaint attached to their motion to intervene asked the court to prohibit notifying any class members in the five states of the settlement, carve out from the settlement members of the putative five-state class, and prohibit the parties from

communicating in any way with those persons. Proposed Cmplt. at 4-5 (Ex. 5).

The trial court denied Ford and Dunne's motion to intervene in an order entered on March 5, 2010. Ex. 6. Ford and Dunne filed their notice of appeal on March 19, 2010.

Argument

I. The Order Denying Leave To Intervene Is Not Appealable.

Under Ohio law, “[i]t is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction.” *Gehm v. Timberline Post & Frame*, 112 Ohio St. 3d 514, 2007–Ohio–607, 861 N.E.2d 519, ¶¶ 14, 36-37 (holding that “the denial of the motion to intervene is not a final, appealable order”—“[t]here is no authority to support the general proposition that a motion to intervene always constitutes a final, appealable order”). Whether an order is final is defined by the provisions of R.C. § 2505.02. *State ex rel. Sawicki v. Court of Common Pleas*, 121 Ohio St. 3d 507, 2009–Ohio–1523, 905 N.E.2d 1192, ¶¶ 13, 17 (holding that an order denying a motion to intervene in the court of appeals was not final and appealable). As explained below, the trial court's ruling denying intervention is not a final order under R.C. § 2505.02.

Ford and Dunne cite only one basis for appellate jurisdiction: R.C. § 2505.02(B)(1), which provides that an order is not “final” unless it “affects a substantial right in an action that in effect determines the action and prevents a judgment.” See Ex. 7 ¶ B(1)(c) (Ford and Dunne's docketing statement in this Court). The denial of intervention here is not appealable under subsection (B)(1).

First, “[f]or an order to determine the action, it must dispose of the merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court.” *Sawicki*, 121 Ohio St. 3d 507, 2009–Ohio–1523, 905 N.E.2d 1192, ¶ 16 (quoting *VIL Laser Sys.*

v. Shiloh Indus., 119 Ohio St. 3d 354, 2008–Ohio–3920, 894 N.E.2d 303, ¶ 8). Thus, “[a] judgment that *leaves issues unresolved and contemplates further action is not a final, appealable order* under (B)(1) unless the remaining issue is mechanical and involve[s] only a ministerial task.” *VIL Laser*, 119 Ohio St. 3d 354, 2008–Ohio–3920, 894 N.E.2d 303, ¶ 8 (emphasis added). In *Sawicki*, the Supreme Court held that the denial of a motion to intervene in the court of appeals in a procedendo case (*i.e.*, to compel the trial court to vacate a stay and proceed to judgment) “did not constitute a final, appealable order” under § 2505.02(B)(1) because it did not dispose of the merits of the procedendo case, the underlying medical malpractice litigation, “or a distinct branch of either”—the proposed intervenor “could litigate the substance” of the case in the underlying litigation. *Sawicki*, 121 Ohio St. 3d 507, 2009–Ohio–1523, 905 N.E.2d 1192, ¶¶ 15-17. So too here. The substance of Ford and Dunne’s intervention argument—that the settlement the trial court preliminarily approved is “unfair and inadequate” in various respects (Mot. to Intervene at 8)—has not been determined, but, if Ford and Dunne do not opt out, may be addressed at the June 1, 2010 fairness hearing. Ford and Dunne are free to object to the proposed settlement and present those objections at that hearing. Alternatively, if they opt out of the settlement, they may pursue the merits of their individual claims in separate litigation. Either way, the order denying intervention does not dispose of the merits of their underlying claims or their objections to the settlement—it leaves those issues “unresolved and contemplates further action.” *VIL Laser*, 119 Ohio St. 3d 354, 2008–Ohio–3920, 894 N.E.2d 303, ¶ 8.

Second, an order denying intervention does not “in effect determine[] the action and prevent[] a judgment” (R.C. § 2505.02(B)(1)) with respect to the proposed intervenor when the intervenor can protect his or her rights in future proceedings. *Gehm*, 112 Ohio St. 3d 514, 2007–Ohio–607, 861 N.E.2d 519, ¶ 37; see also *id.* ¶ 33 (rejecting cases that had ruled that “the denial

of a motion to intervene constitutes a final, appealable order”—“[n]one of the cases cited... conducted the required statutory analysis”).

For example, in *Richardson v. Richardson*, 4th Dist. No. 09CA3293, 2009–Ohio–6492, 2009 WL 4725980, the court held that an order denying two grandparents’ motion to intervene in a divorce case in order to seek visitation rights was not appealable under R.C. § 2505.02(B)(1). After noting that “[a] grandparent does not need to intervene...to file a... motion for visitation” (*id.* ¶ 8), the court explained that because the denial of intervention “did not dispose of the merits of the visitation motion, i.e. the purpose for which intervention was sought,” the “entry denying intervention is not a final, appealable order.” *Id.* ¶ 10. The trial court “ha[d] not addressed the merits of the motion for grandparent visitation” and would “consider th[at]...motion” in future proceedings. *Id.* The same is true here. Ford and Dunne can protect their rights by either objecting to the proposed settlement at the fairness hearing or opting out of the settlement and litigating their individual claims in Missouri. The order denying intervention “did not dispose of” either alternative (*id.*); both are still available to Ford and Dunne in future proceedings. See also *Luna v. Allstate Ins.*, 10th Dist. No. 07AP-430, 2007–Ohio–6597, 2007 WL 4305885, ¶ 12 (the denial of an attorney’s motion to intervene in a personal injury case was not appealable because he “has the opportunity, if necessary, to litigate in the future his entitlement to quantum meruit compensation”); *Wilson v. United Fellowship Club*, 9th Dist. No. 22792, 2006–Ohio–1047, 2006 WL 551356, ¶ 5 (the denial of an insurance company’s motion to intervene in litigation against its policyholder is “not a final, appealable order” because it does not “‘determine[] the action and prevent[] a judgment’”); Baldwin’s Ohio Handbook Series, Ohio Appellate Practice § 2:7 (2010) (“A denial of a non-party’s motion to intervene...does not meet the test of RC 2505.02(B)(1), because it does not ‘prohibit future litigation’ in a separate action”).

Finally, we note that in an unpublished 2001 decision, this Court stated that proposed intervenors could immediately appeal an order denying intervention after the trial court denied class certification. *George v. Realty One Prop. Mgt.*, 8th Dist. No. 78929, 2001 WL 1166950, at *1. But given the Supreme Court’s 2007 decision in *Gehm*, any attempt by Ford and Dunne to rely on *George* would be misplaced.

George relies on two prior cases, *Likover v. City of Cleveland* (1978), 60 Ohio App. 2d 154, 155, 396 N.E.2d 491, and *Jamestown Village Condo. v. Market Media Research* (1994), 96 Ohio App. 3d 678, 694, 645 N.E.2d 1265 (which cites *Likover* and *Blackburn v. Hamoudi* (1986), 29 Ohio App. 3d 350, 352, 505 N.E.2d 1010). In *Gehm*, the Supreme Court discussed a number of lower court cases that had permitted immediate appeals from orders denying intervention, including specifically *Likover* and *Blackburn*, and refused to follow them, explaining that “[n]one of the cases cited” by Westfield, the appellant, “conducted the required statutory analysis.” *Gehm*, 112 Ohio St. 3d 514, 2007–Ohio–607, 861 N.E.2d 519, ¶¶ 9-11, 33. (Westfield’s Supreme Court brief in *Gehm* cited both *Likover* and *Blackburn*. See 2006 WL 1403687, at *10.) As the Supreme Court summarized, “[a] review of the cases cited by Westfield in support of its contention that a motion to intervene is a final, appealable order does not reveal the fact-dependent statutory analysis required by R.C. 2505.02. There is no authority to support the general proposition that a motion to intervene always constitutes a final, appealable order.” *Gehm*, ¶ 36.

Conclusion

For the reasons explained, this Court’s order denying intervention is not appealable at this juncture under § 2505.02(B)(1). This appeal should be dismissed for lack of appellate jurisdiction.

April 8, 2010

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DEFENDANTS' MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION** was served via ordinary U.S. mail, postage prepaid, this 8th day of April, 2010 upon the following:

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