

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Kent Rigsby et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 10AP-288
Robert E. Albright et al.,	:	(C.P.C. No. 09CVA10-15045)
Defendants/Third-Party	:	(REGULAR CALENDAR)
Plaintiffs-Appellees,	:	
Kenneth R. Donchatz, Esq. et al.,	:	
Third-Party Defendants-	:	
Appellants.	:	

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D E C I S I O N

Rendered on November 18, 2010

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*Lane, Alton & Horst, LLC, Rick E. Marsh, Jennifer A. French, and Ray S. Pantle; Johrendt, Cook & Eberhart, and Michael J. Johrendt, for Third-Party Plaintiffs-Appellees.*

*Reminger Co., L.P.A., and Matthew L. Schrader, for Third-Party Defendants-Appellants.*

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Third-party defendants-appellants, Kenneth R. Donchatz and Kettlewell & Donchatz, LLP (collectively "Donchatz"), appeal from an entry of the Franklin County Court of Common Pleas journalizing the trial court's decision denying Donchatz' motion to

dismiss the third-party complaint of third-party plaintiffs-appellees, Robert E. Albright and Lucas, Pendergast, Albright, Gibson & Newman (collectively "Albright"). Donchatz assigns a single error:

The Trial Court erred in denying Third-Party Defendants/Appellants' Motion to Dismiss the Third-Party Complaint filed by Third-Party Plaintiffs/Appellees.

Because the trial court's decision is not a final appealable order, we dismiss for lack of jurisdiction.

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

{¶2} On December 12, 2007, Albright entered an appearance as counsel for Kent Rigsby and Rigsby Fourth and Main, LLC (collectively "Rigsby") in a case naming them as defendants ("the underlying case"). The underlying case was tried before a magistrate on May 6, 2008. The magistrate's report and recommendation, issued on May 8, 2008, ruled adversely to Rigsby. On May 16, 2008, Rigsby terminated his attorney-client relationship with Albright and retained Donchatz as counsel; Donchatz entered its appearance the same day. Donchatz filed objections to the magistrate's decision on behalf of Rigsby in the underlying case. The objections ultimately were overruled and judgment was entered against Rigsby.

{¶3} On October 7, 2009, Rigsby, again represented by Donchatz, filed a complaint against Albright alleging legal malpractice stemming from Albright's services in the underlying case. On November 16, 2009, Albright filed a third-party complaint against Donchatz seeking contribution from Donchatz pursuant to R.C. 2307.22 and 2307.23 should Albright be found liable on Rigsby's legal malpractice complaint.

{¶4} On January 4, 2010, Donchatz responded with a Civ.R. 12(B)(6) motion to dismiss the third-party complaint, arguing both that any potential cause of action against Donchatz had not yet accrued and that to allow Albright's third-party complaint would violate public policy. After the parties fully briefed the motion, the trial court issued a decision on February 10, 2010 denying Donchatz' motion to dismiss the third-party complaint, concluding Donchatz did not demonstrate Albright "can prove no set of facts warranting recovery." (Decision at 4.) The trial court journalized its decision in an entry dated March 2, 2010. Donchatz timely appeals.

## II. Final Appealable Order

{¶5} On April 7, 2010, Albright filed a motion to dismiss the appeal, contending the trial court's decision is not final and appealable. Because this court's jurisdiction turns on whether Donchatz appealed from a final appealable order, we first address Albright's motion.

{¶6} Donchatz acknowledges the rule that "[g]enerally, an order denying a motion to dismiss is not a final order." *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, ¶8, quoting *Polikoff v. Adam* (1993), 67 Ohio St.3d 100, 103. Donchatz, however, contends its appeal falls outside the general rule. Donchatz points out that the third-party complaint creates a conflict of interest for Donchatz that effectively will permit Albright to disqualify Donchatz as Rigsby's counsel of choice in the malpractice action against Albright. Donchatz argues that if Albright's third-party complaint is allowed to stand, Rigsby's right to select privately retained counsel in a civil action, a substantial right, will be violated in much the same way as a sustained

motion to disqualify counsel, a decision that is immediately appealable. See *Martinez v. Yoho's Fast Food Equip.* (Dec. 19, 2000), 10th Dist. No. 00AP-441.

{¶7} Pursuant to Section 3(B)(2), Article IV, Ohio Constitution and R.C. 2505.03, appellate courts have jurisdiction to review only final orders, judgments or decrees. "[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." *Browder v. Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶10, quoting *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, quoting *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306. R.C. 2505.02(B), in turn, defines a final order, specifying those orders which may be reviewed, affirmed, modified or reversed on review in a court of appeals. As relevant here, only R.C. 2505.02(B)(1) and (4) possibly may apply.

A. R.C. 2505.02(B)(1)

{¶8} An order is final and appealable under R.C. 2505.02(B)(1) if it "affects a substantial right in an action that in effect determines the action and prevents a judgment." Here, the trial court's denial of Donchatz' motion to dismiss meets neither branch of R.C. 2505.02(B)(1). "[A] motion to dismiss is a procedural mechanism that tests the sufficiency of the allegations in the complaint." *Titanium Metals Corp.* at ¶8, citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. Thus, an order denying a motion to dismiss does not determine the action as the merits "have yet to be addressed." *Ferrell v. Standard Oil Co. of Ohio* (1984), 11 Ohio St.3d 169, 171. Even the more narrow issue of whether Donchatz is disqualified as counsel for

Rigsby is not yet determined; the trial court decided only that Albright's third-party complaint will not be dismissed.

{¶9} Nor does the trial court's determination affect a substantial right. R.C. 2505.02(A)(1) defines 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." Thus, "[a] substantial right is a legal right that is entitled to enforcement and protection by law." *Browder* at ¶13, citing *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88. Even if Donchatz correctly asserts Rigsby has a substantial right in choosing privately retained counsel in a civil action, the issue here is whether the trial court's order *affects* the substantial right Donchatz asserts. See *Browder* at ¶13. If it does not, the order is not final. *Id.*, citing *Burt v. Harris*, 10th Dist. No. 03AP-194, 2004-Ohio-756, ¶12.

{¶10} "An order affecting a substantial right is 'one which, if not immediately appealable, would foreclose appropriate relief in the future.' " *Id.*, quoting *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63. Here, the trial court's order does not affect Donchatz' substantial right: the trial court's decision does not in itself disqualify Donchatz as Rigsby's counsel and, when the matter is returned to the trial court, Donchatz still will be Rigsby's attorney.

{¶11} Unquestionably, the trial court's decision places Donchatz in a position creating an arguable conflict of interest. In all likelihood Albright will file a motion to disqualify Donchatz as Rigsby's counsel on the grounds he has a conflict of interest, a contention with which the trial court may concur since it springs from the trial court's decision denying Donchatz' motion to dismiss. If the trial court disqualifies Donchatz as

Rigsby's attorney, the issue of whether counsel properly may be disqualified, which in turn invokes consideration of whether third-party practice against a legal malpractice plaintiff's counsel is proper, will be final and appealable. *Carnegie Cos., Inc. v. Summit Properties, Inc.*, 183 Ohio App.3d 770, 2009-Ohio-4655, ¶17, quoting *Russell v. Mercy Hosp.* (1984), 15 Ohio St.3d 37, syllabus (stating "[t]he Ohio Supreme Court has held that '[t]he granting of a motion to disqualify counsel in a civil action is a final, appealable order [under] R.C. 2505.02' "). Because, however, the trial court's ruling does not yet disqualify Donchatz or affect Rigsby's right to select counsel of choice, it is not a final appealable order under R.C. 2505.02(B)(1).

B. R.C. 2505.02(B)(4)

{¶12} R.C. 2505.02(B)(4) defines a final order as one "that grants or denies a provisional remedy," provided two conditions also are met. Initially, the order subject of appeal must determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party regarding the provisional remedy. R.C. 2505.02(B)(4)(a). Secondly, an appeal following judgment must not afford a meaningful and effective remedy to the appealing party. R.C. 2505.02(B)(4)(b).

{¶13} R.C. 2505.02(A)(3) defines a provisional remedy as "a proceeding ancillary to the action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence," or prima facie showings with respect to specified statutes. Donchatz urges us to construe the trial court's entry denying its motion to dismiss the third-party complaint as an order granting or denying a provisional remedy because it, in effect, disqualifies Donchatz as Rigsby's counsel in the malpractice action. See *Carnegie Cos.*, *supra*, quoting *Russell*, *supra*.

{¶14} Donchatz' argument under R.C. 2505.02(B)(4) suffers the same deficiency as his R.C. 2505.02(B)(1) contentions. Initially, we would be hard-pressed to say the trial court's decision denying Donchatz' motion to dismiss is a provisional remedy. Although Donchatz urges that it properly may be so categorized because it effectively disqualifies counsel, the trial court's decision does not. The trial court must issue an additional ruling to disqualify counsel, and that ruling will be final and appealable.

{¶15} Moreover, for the same reasons articulated in resolving Donchatz' contentions under R.C. 2505.02(B)(1), the trial court's order does not affect Rigsby's right to counsel of choice; the trial court's ruling is at least one step removed from disqualifying Donchatz as Rigsby's attorney. On remand, if the trial court grants a motion to disqualify Donchatz due to a conflict of interest, then the court will have issued an appealable order that may be appealed, where this court at that time may address the issue Donchatz prematurely presents in the present appeal. Accordingly, the trial court's decision does not present a final order under R.C. 2505.02(B)(4).

{¶16} In the final analysis, the trial court's decision to deny Donchatz' motion to dismiss does not disqualify Donchatz as counsel; indeed, no motion to disqualify Donchatz as counsel has been filed in the trial court. The trial court's decision merely tested the adequacy of Albright's third-party complaint under the Civ.R. 12(B)(6) standard and determined it would not dismiss Albright's third-party complaint. Although a motion to disqualify Donchatz as counsel due to a conflict of interest may soon follow, the trial court's decision on appeal does not do so and is not final and appealable under R.C. 2505.02.

{¶17} Because Donchatz does not appeal from a final order of the trial court, this court lacks jurisdiction to consider Donchatz' assigned error. *Browder* at ¶11, citing *Davison v. Rini* (1996), 115 Ohio App.3d 688, 692. We therefore grant Albright's motion and dismiss Donchatz' appeal for lack of jurisdiction.

*Motion to dismiss granted;  
appeal dismissed.*

KLATT and McGRATH, JJ., concur.

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