

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000809-MR

STATE FARM FIRE & CASUALTY
COMPANY; AND WADE HEMBREE

APPELLANTS

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 00-CI-00134

CARYN GRATZ, EXECUTRIX OF
THE ESTATE OF WILLIAM GRATZ,
DECEASED; AND CARYN GRATZ;
AND LEE ANN WILLIAMS, BY AND
THROUGH HER NEXT FRIEND,
GARY WILLIAMS

APPELLEES

OPINION
DISMISSING

** **

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

BARBER, JUDGE: The Appellants, State Farm Fire & Casualty Company, and Wade Hembree, seek review of an order of the Shelby Circuit Court denying their motion for summary judgment. They contend that the trial court erred, as a matter of law, in interpreting an exclusion in the Gratzes' homeowner's policy.

We dismiss the appeal because it was not taken from a final and appealable order.

The denial of a motion for summary judgment is generally not appealable; however, an exception to the general rule applies where the facts are not in dispute, the only basis of the ruling is a matter of law, the motion is denied, ***and there is entry of a final judgment with an appeal therefrom.***¹ In the case *sub judice*, there was no appeal from a final judgment, thus, we dismiss.

The essential facts relevant to the trial court's ruling are not in dispute. On or about September 9, 1999, the Appellee, Lee Ann Williams (Leigh Ann), went to the home of the Appellees, Caryn and William Gratz (Gratzes), to play with their daughter, Carli. At that time, Lee Ann was ten years old. The girls were riding go-carts, owned by the Gratzes, on a tractor path adjacent to their property. Lee Ann failed to make a turn in the path, and was injured when she drove the go-cart into a dry creek bed.

At the time of the accident, the Gratzes were insured by a homeowner's policy with the Appellant, State Farm. On April 17, 2000, Lee Ann, by and through her next friend, Gary Williams, filed a complaint against the Gratzes in the Shelby Circuit Court, alleging that she was injured as a result of

¹ *Transportation Cabinet, Bureau of Highways, Commonwealth of Kentucky v. Leneave*, Ky. App., 751 S.W.2d 36, 37 (1988).

their negligence. On May 4, 2001, the Gratzes filed a motion for leave to file a third party complaint against Wade Hembree, the insurance agent, for breach of fiduciary duty, and against State Farm, for a determination that it had a duty to provide coverage and defend the subject lawsuit. On May 10, 2001, the trial court granted the Gratzes' motion.

On November 5, 2001, State Farm filed a motion for summary judgment, asserting that it had no coverage, and therefore no duty to defend or indemnify the Gratzes. State Farm maintained that the go-cart was included in the policy's definition of "motor vehicle," and that it had no coverage for injuries arising out of the go-cart's use, unless it occurred on an insured location. On January 24, 2002, the trial court entered an order denying the motion for summary judgment, because "[t]he plain reading of the exclusion does not include 'go-cart.'" On March 5, 2002, State Farm filed both a motion to bifurcate "the trial of the claims asserted in the Third Party Complaint from the trial of the underlying negligence suit" and a motion to make the order denying its motion for summary judgment "final and appealable."

On April 9, 2002, the trial court granted the motion to bifurcate, and ordered that the third-party claim against State Farm and Wade Hembree be held in abeyance, pending final adjudication of the underlying negligence claim against the

Gratzes. A second order was entered on April 9, 2002 that states in relevant part:

[T]he January 24, 2002 Order overruling the Third Party Defendant's Motion for Summary Judgment and finding a duty to defend and indemnify on behalf of State Farm Fire & Casualty Company in regard to the claims of the Plaintiff against the Defendants/Third Party Plaintiffs, is hereby made a final and appealable Order, the trial to proceed on the merits simultaneously.

CR 54.01 provides:

A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02. Where the context requires, the term "judgment" as used in these rules shall be construed "final judgment" or "final order".

The January 24, 2002 denial of summary judgment did not adjudicate all the rights of all the parties. Therefore, the judgment was interlocutory and nonappealable and could only be made final and appealable by compliance with CR 54.02(1).²

CR 54.02(1) provides that:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any

² *Hale v. Deaton*, Ky., 528 S.W.2d 719 (1975).

order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.
(Emphasis added.)

The April 9, 2002 order does not recite the determination that there is no just reason for delay, as mandated by the rule.

For the purpose of making an otherwise interlocutory order final and appealable, the trial court is required to determine 'that there is no just reason for delay,' and the judgment must recite this determination and also recite that the judgment is final CR 54.02(1). The omission of one of these requirements is fatal.
(Citation omitted.)³ (Emphasis added.)

The appeal is dismissed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES, CARYN
GRATZ, EXECUTRIX OF THE ESTATE
OF WILLIAM GRATZ, DECEASED,
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BREIF FOR APPELLEES, LEE ANN
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NEXT FRIEND, GARY WILLIAMS:

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³ *Id.*, at 722.