

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002353-MR

BARRIE CREAMER

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 00-CI-01698

THE HARTFORD UNDERWRITERS INSURANCE COMPANIES

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Barrie Creamer has appealed from an order entered by the Kenton Circuit Court on November 7, 2002, which dismissed her bad-faith claim against John Orrick, a claims supervisor employed by The Hartford Underwriters Insurance Companies, for lack of personal jurisdiction.¹ Having concluded that Creamer's failure to name Orrick in the notice of appeal

¹ Creamer also brought a bad-faith claim against The Hartford. Creamer's claim against The Hartford was not dismissed pursuant to the order entered by the Kenton Circuit Court on November 7, 2002.

filed on November 15, 2002, is a jurisdictional defect which cannot be remedied, we dismiss this appeal.

The notice of appeal filed by Creamer reads, in relevant part, as follows:

Notice is given that Barrie Creamer, Appellant, by and through counsel, hereby appeals to the Kentucky Court of Appeals from the Order entered in this action on November 7, 2002.

The name of the Appellant is BARRIE CREAMER. The names of the Appellee against whom this appeal is taken is: THE HARTFORD UNDERWRITERS INSURANCE COMPANIES.

Clearly, John Orrick is not listed in the notice of appeal.

Under Kentucky law, failure to name an indispensable party in a timely-filed notice of appeal is a jurisdictional defect that cannot be remedied.² "If a party fails to name an indispensable party in the notice of appeal, the appeal must be dismissed."³

This Court entered an order directing the parties to file supplemental briefs concerning whether Orrick is an indispensable party to this appeal. In Creamer's supplemental brief, she "concedes that Mr. Or[r]ick is an indispensable party[.]" However, Creamer filed a motion to amend the notice

² City of Devondale v. Stallings, Ky., 795 S.W.2d 954, 957 (1990). See also Kentucky Rules of Civil Procedure 72.02(2).

³ Commonwealth v. Blincoe, Ky.App., 34 S.W.3d 822, 824 (2000) (citing Stallings, supra at 957).

of appeal and a motion to dismiss the appeal on the grounds that the order appealed from lacks finality.

As to Creamer's motion to amend the notice of appeal, our Supreme Court has expressly declined to apply the doctrine of substantial compliance to jurisdictional defects, such as the failure to name an indispensable party in the notice of appeal.⁴ Thus, it makes no difference that Orrick may have been aware of the fact that he was intended to be a party to this appeal. Since Orrick is an indispensable party, the failure to name him as an appellee is a jurisdictional defect which cannot be remedied by an amended notice of appeal.

As to Creamer's motion to dismiss the appeal for lack of finality, we note that the order entered on November 7, 2002, dismissed Creamer's claims against Orrick only, thus, allowing the claims against The Hartford to proceed. Furthermore, the trial court stated that "[i]t appearing to the Court that there are multiple parties, there is no just reason for delay and this is a final and appealable Order." Accordingly, under CR 54.02(1) the order entered on November 7, 2002, constituted the granting of "a final judgment upon one or more but less than all of the claims or parties" since the order made "a determination that there is no just reason for delay." Thus, the order entered on November 7, 2002, met all the requirements of

⁴ "We believe that the substantial compliance policy cannot be applied to retroactively create jurisdiction." See Stallings, 795 S.W.2d at 957.

finality set forth in CR 54.02, and we cannot conclude that the trial court abused its discretion by making the order final and appealable.

Therefore, Creamer's motion to dismiss appeal for lack of finality is DENIED. Furthermore, Creamer's motion to amend the notice of appeal is DENIED.

Finally, based on Creamer's failure to name Orrick, who is an indispensable party, as an appellee to this appeal, this appeal is DISMISSED.

ALL CONCUR.

ENTERED: October 24, 2003

/s/ Rick A. Johnson_____
JUDGE, COURT OF APPEALS

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Larry Hicks
Edgewood, Kentucky

BRIEF FOR APPELLEE:

Thomas C. Smith
R. Scott Hughes
Covington, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Thomas C. Smith
Covington, Kentucky