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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000052-MR

GEORGE CROXTON, JR., AND
AVERITT EXPRESS, INC. APPELLANTS

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NOS. 00-CI-00110 AND 00-CI-00176

BILLY R. WAGERS; RUTH WAGERS;
COMBS PETROLEUM AND KESA APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE: The issue in this appeal is whether the real party in interest moved to intervene in the lower court. The movant is listed as the employer as insured by the compensation carrier. The compensation carrier was sufficiently identified under the facts of this case and under the substantial compliance doctrine. Hence, we affirm.

Billy Wagers (Wagers) was involved in a vehicular accident in the course and scope of his employment with Combs Petroleum. Wagers was injured and received Workers' Compensation. Wagers and his wife sued George Croxton, Jr., (Croxton) and his employer, Averitt Express, Inc. (Averitt), for causing the accident. KESA, the compensation carrier for Combs Petroleum, moved to intervene to recover Workers' Compensation benefits paid by KESA. Croxton and Averitt objected, but long after the 10-day period in CR 24.01(2) expired. The trial court never ruled on the motion and proceeded with the trial. A jury verdict was returned in favor of Wagers.

Subsequent to the jury deliberations, the court ruled that KESA was entitled to recover benefits paid with the balance to Wagers. Croxton and Averitt objected and filed a motion to alter, amend or vacate, contending that KESA had not intervened so it could not recover Workers' Compensation benefits it paid; and that Croxton and Averitt would not have to pay those sums to Wagers because it would amount to a double recovery.[1] The motion to alter, amend or vacate was denied and this appeal followed.

On appeal, Croxton and Averitt contend the trial court erred in allowing KESA to intervene for two reasons. First, they contend KESA improperly moved as "Combs Petroleum, as insured by KESA," which is not the real party in interest, that

[1] See Krahwinkel v. Commonwealth Aluminum Corp., 183 S.W.3d 154 (Ky. 2005).

KESA had to move as KESA, the insurer of Combs Petroleum, and the failure to do so was fatal. Secondly, Croxton and Averitt contend that (even if the trial court was correct in allowing KESA to intervene), they were entitled to file an answer, have discovery, etc., before trial, and that the failure to so rule was error.

The first part of their argument is that KESA was the real party in interest and should have moved to intervene under CR 17.01 as KESA, the insurer of Combs Petroleum, instead of Combs Petroleum, as insured by KESA. We agree that the motion to intervene (as authorized by KRS 342.700 and CR 24.01(2)) has to be by the real party in interest under CR 17.01, which would be the workers' compensation carrier. However, we also believe that under the facts of this case, there was substantial compliance, and the trial court did not err in concluding that KESA was intervening as the insurer of Combs Petroleum.

Substantial compliance with the civil rules is the guide in reviewing the motion to intervene. In Tankersley v. Gilkey, 414 S.W.2d 589, 591 (Ky. 1967), our highest court found substantial compliance when an order was entered but not signed by the judge. The order was entered on the order book, which the judge then signed. Although not in "strict conformity with civil rules" the Court accepted "substantial compliance." In Dairyland Insurance Company v. Clark, 476 S.W.2d 202, 203 (Ky.

1972), an insurer moved to intervene in a personal injury action by its insured against an alleged tortfeasor. The Court recognized "[t]he proper application and utilization of the Civil Rules should be left largely to the supervision of the trial judge and we must respect his exercise of sound judicial discretion in their enforcement." Id.

In Ready v. Jamison, 705 S.W.2d 479, 481 (Ky. 1986), our Supreme Court reviewed three unrelated cases with a request to dismiss a timely filed appeal because the judgment appealed from was not properly designated. Instead, the postjudgment rulings were designated. The Court held under the new rules (effective Jan. 1, 1985), substantial compliance, rather than strict compliance, is all that is needed. The Court went on to explain substantial compliance, "so long as the judgment appealed from can be ascertained within reasonable certainty from a complete review of the record . . . and no substantial harm or prejudice has resulted to the opponent." Id. at 481-482.

In our case, the motion to intervene substantially complied with CR 17.01 in designating the real party in interest when it read, Combs Petroleum as insured by KESA, instead of KESA, the insurer of Combs Petroleum. The trial court implicitly ruled so when it permitted KESA to intervene. No one

questioned that KESA was intervening until after judgment was entered, and we see no harm or prejudice to the opponent.

The next part of Croxton and Averitt's argument is that even if KESA did intervene, the trial court erred in not continuing the trial for an answer, discovery, etc. The problem with this argument is that it was not preserved for two reasons. First, after the initial motion to intervene by right (under KRS 342.700) was filed, under CR 24.01(2), any objection had to be filed within ten days. Therefore, the objection was untimely. Secondly, the basis of the objection was that the intervening party had no standing to intervene (disposed of above). The answer, etc., filed after the trial, had no effect on the judgment and the post-trial motion to alter, amend, or vacate, which challenged service and standing to intervene. To preserve an issue for appeal, the issue must have been raised in the lower court and a reviewing court will only consider a case upon the theories argued below. Weissinger v. Mannini, 311 S.W.2d 199, 201 (Ky. 1958). See also Sand Hill Energy, Inc. v. Smith, 142 S.W.3d 153, 163 (Ky. 2004), on the issue of preservation through the jury instructions.

For the foregoing reasons, the judgment of the Whitley Circuit Court is affirmed.

VANMETER, JUDGE, CONCURS.

McANULTY, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

McANULTY, JUDGE, DISSENTING: Respectfully, I dissent. Simply put, the real party in interest is KESA. The rule (CR 17.01) is clear – the motion to dismiss of Croxton and Averitt Express, Inc., is clear as is the failure to properly identify the insurance carrier. In my opinion the substantial compliance doctrine does not apply. Lampton v. Boley, 870 S.W.2d 428 (Ky. App., 1994).

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