

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001003-MR

TROY ALLEN CARNEY

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT  
HONORABLE ALLAN RAY BERTRAM, JUDGE  
ACTION NO. 05-CI-00048

TISHA FAYE CARNEY

APPELLEE

### OPINION AND ORDER DISMISSING

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BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,<sup>1</sup> SENIOR JUDGE.

KELLER, JUDGE: Troy Allen Carney has appealed from the Washington Circuit Court's April 17, 2006, order denying his motion to alter, amend, or vacate, finding him in contempt, and ordering him to pay attorney fees. Because we have determined that Troy has improperly taken an appeal from a non-final, non-appealable order, we must dismiss the appeal as interlocutory.

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<sup>1</sup> Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Troy and Tisha Faye Carney were married in Washington County, Kentucky on March 28, 1995. One child, Heather Danielle Carney, was born of the marriage. Troy and Tisha separated on December 25, 2004, and Tisha filed a Petition for Dissolution of Marriage on April 26, 2005. The parties entered into a temporary agreement whereby Tisha was named the residential custodian of their daughter, Troy was permitted reasonable visitation, and Troy was ordered to pay child support in the amount of \$85.00 per week. A hearing on the remaining property settlement issues was scheduled for August 22, 2005. Troy, who at the time did not have an attorney, did not appear at the hearing. The circuit court then entered a Decree of Dissolution of Marriage, which also included rulings on custody and the division of marital property and debts.

Following the entry of the decree, Troy retained new counsel and moved the circuit court to alter, amend or vacate its previous judgment, arguing that the personal property was not fairly divided, among other issues. While that motion was pending, Tisha filed a motion requesting that the circuit court order Troy to show cause why he should not be held in contempt for his failure to comply with the terms of the property settlement and child support orders. In the same motion, Tisha requested the circuit court to order the marital real estate sold to resolve the remaining property claims between the parties. Finally, she requested attorney fees. In response, Troy disputed Tisha's right to request the sale of the marital residence. Furthermore, he stated that he was deducting money from his support obligation as reimbursement for outstanding taxes on the vehicles.

The circuit court held a hearing on the pending motion to alter, amend or vacate and on the contempt issue on April 6, 2006.<sup>2</sup> On April 17, 2006, the circuit court entered the following order:

This matter having come before the Court on competing motions of the parties, and the Court having heard argument of counsel, and having been otherwise advised, NOW Therefore, it is hereby ordered as follows:

1. [Troy's] motion to alter, amend or vacate the Court's previous decree is denied.

2. On [Tisha's] motion to have [Troy] held in contempt for failure to pay child support as ordered, the Court, finds that [Troy] is in fact in contempt of the Court's order to pay child support.

3. [Troy] shall have 30 days to pay the past due child support and medical expenses which [Tisha] asserts is \$283.39 plus \$362.00 respectively, subject to any documentation [Troy] may provide to counsel for [Tisha] that establishes otherwise.

4. [Tisha's] motion to resolve the remaining property settlement issue by sale of the residence is passed to the next motion day, May 5, 2006 at 1:00 P.M.

5. [Troy] shall pay to [Tisha's] attorney the sum of \$150.00 for his attorney fee in this proceeding.

The circuit court did not state that the order was final and appealable or that there was no just cause for delay. This appeal followed.

At the outset, we must address what we have determined to be a fatal jurisdictional issue in this case. Kentucky's Civil Rules of Procedure provide definitions of several legal terms of importance in this appeal. A judgment is defined as “a written

<sup>2</sup> The certified record does not contain a videotape of this hearing.

order of a court adjudicating a claim or claims in an action or proceeding.” CR 54.01. A final and appealable judgment is further defined as “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.” *Id.* CR 54.02(1) provides that “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.”

The Supreme Court of Kentucky recently addressed the jurisdictional aspect of the appellate process in *Wilson v. Russell*, 162 S.W.3d 911, 913-14 (Ky. 2005):

It is fundamental that a court must have jurisdiction before it has authority to decide a case. Jurisdiction is the ubiquitous procedural threshold through which all cases and controversies must pass prior to having their substance examined. So fundamental is jurisdiction that it is the concept on which first-year law students cut their teeth. Here, jurisdiction in the context of appellate procedure is at issue because no final order or judgment has been entered by the trial court. At the outset we note that an appeal may be properly considered only if perfected according to our rules of practice and procedure. Our rules require that there be a final order or judgment from which an appeal is taken.<sup>3</sup>

We begin with CR 73.02. “The notice of appeal shall be filed within 30 days after the date of notation of service of the *judgment or order* under Rule 77.04.” CR 77.04(2) mandates that the clerk of the court immediately serve a notice of entry of a *judgment or final order*, among other things, upon every party to the proceeding who is not in

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<sup>3</sup> KRS 22A.020 grants jurisdiction to the Court of Appeals regarding interlocutory orders of the Circuit Court in civil cases provided that it is authorized by rules promulgated by the Supreme Court. However, CR 65.07, which is the rule promulgated by the Supreme Court allowing for such jurisdiction, deals only with injunctions, which are not at issue in this appeal. (Footnote 1 in original.)

default for failure to appear. CR 54.01 defines a final or appealable judgment as a final order “adjudicating all the rights of all the parties in an action or proceeding.” CR 54.02 does provide a limited exception where there are multiple parties or multiple claims. It allows for an appeal when less than all the rights of all the parties have been adjudicated, but only upon a determination that it is final and that there is no just reason for delay. In the absence of such finality and a recitation thereof, the order is interlocutory and subject to modification and correction before becoming a final and appealable judgment or order.

The judgment from which Wilson sought to appeal does not adjudicate all the rights of all the parties. [CR 54.01.] To the contrary, it specifically calls for a new trial as to comparative negligence and damages. Therefore, it was not appealable. And Wilson finds no refuge in CR 54.02 because no part of the order was final and appealable. Despite the foregoing, neither party nor the Court of Appeals identified this issue. However, even though not raised, “jurisdiction may not be waived, and it can not be conferred by consent of the parties. This [C]ourt must determine for itself whether it has jurisdiction.” [*Hubbard v. Hubbard*, 303 Ky. 411, 197 S.W.2d 923 (1946). *See also* Kentucky Bar Foundation, Kentucky Appellate Practice § 21.03 (1985).] As there is no final order or judgment from which to appeal, the Court of Appeals was without jurisdiction. [*See American Fidelity & Casualty Co. v. Patterson*, 314 Ky. 741, 742-43, 237 S.W.2d 57 (1951) (“Not having a final judgment in the record, we are without jurisdiction of the appeal in this case.”); *see also Coomer v. Commonwealth*, 309 Ky. 575, 576, 218 S.W.2d 393 (1949) (“[A]s there is no judgment contained in the record there is nothing from which he may prosecute an appeal; therefore, we are without jurisdiction to entertain his motion and it is hereby overruled.”); *Christman v. Chess*, 102 Ky. 230, 43 S.W. 426 (1897) (“If there was not a final judgment or order in this case, it follows that this court has no jurisdiction of the appeal.”).] And it has long been a fundamental maxim that a court will not assume jurisdiction where it does not exist. [*Cf. Morgan v. Register*, 3 Ky. (Hard.) 609, 610 (1808) (“so neither can we consent to

assume a jurisdiction in defiance of that instrument by which we are bound, and which we are sworn to support.”).]

In the present case, it is clear to this Court that the order from which Troy has appealed is interlocutory. First, the order itself states that an unresolved issue remains between the parties; namely, Tisha's pending motion to resolve the property settlement dispute. Second, the circuit court omitted the language necessary to make the order final and appealable under CR 54.02. Nowhere in the order did the circuit court state that the order was final or that there was no just cause for delay. Although neither party raised this issue, we are mindful, based upon the Supreme Court's dictate in *Wilson*, that we must nevertheless determine whether we have jurisdiction to review a lower court's ruling. Because the order from which this appeal was taken does not contain the necessary recitals and in fact states that an unresolved issue was still pending, we must hold that the April 17, 2006, order is interlocutory. Accordingly, we must dismiss the appeal.

For the foregoing reasons, the above-styled appeal is ORDERED DISMISSED as it was taken from an interlocutory order.

ALL CONCUR.

ENTERED: \_\_\_\_\_

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JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

Jonathan R. Spaulding  
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BRIEF FOR APPELLEE:

Dan Kelly  
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