RENDERED: FEBRUARY 15, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002348-MR
AND
NO. 2006-CA-002354-MR

KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY — APPELLANT/CROSS-APPELLEE

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 04-CI-00576

JASON BLEVINS AND
ALISHA BLEVINS — APPELLEES/CROSS-APPELLANTS

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

KELLER, JUDGE: This matter arises from a Petition for Declaratory Judgment filed by Kentucky Farm Bureau Mutual Insurance Company (KFB), in which it sought a declaration as to whether it owed coverage and a defense to its insureds, Jason and Alisha Blevins (the Blevinses). KFB has appealed, and the Blevinses have cross-appealed, from the Greenup Circuit Court's September 13, 2006, Declaratory Judgment and from the October

17, 2006, Order amending the Declaratory Judgment. Because we have determined that neither the Declaratory Judgment nor Order include the necessary language to make them final and appealable, we must dismiss the above-styled appeal and cross-appeal.

We shall briefly set forth the procedural history of this case. In the underlying suit, James Fuzy and Fonda Robinson sought damages against the Blevinses for losses they incurred when water leaked into the house they purchased from the Blevinses. James and Fonda also named as a defendant Carl Bays, who constructed the house. Based upon the disclosure that Jason made in the seller disclosure form that the roof did not leak, James and Fonda alleged that the Blevinses were in breach of contract, and that they negligently and fraudulently misrepresented that the house was free of defects. The remaining counts were related to allegations that Bays negligently designed and constructed the residence.

KFB, who provided homeowner insurance to the Blevinses while they owned the house, moved for leave to intervene and to file a Petition for Declaratory Judgment, which was granted. In its petition, KFB asserted that it had no obligation under the policy to furnish a defense to the suit against the Blevinses or to pay any judgment arising out of James and Fonda's allegations. The Blevinses then filed a counter-claim against KFB, requesting that it provide both coverage and a defense. Following the submission of briefs, the circuit court entered a

Declaratory Judgment. After reciting the salient facts, the circuit court stated:

> The main issue here is whether the water damage in the home constitutes an "occurrence" under the KFB homeowner policy. The homeowner policy defines "occurrence" as follows:
>
> > "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:
> >
> > a. "Bodily injury"; or
> >
> > b. "Property damage".
> >
> > "Property damage" means physical injury to, destruction of, or loss of use of tangible property.
>
> In *Lenning v. Commercial Union Ins.* Co., 260 F.3d 574 (6th Cir. 2001), ". . . a breach of contract claim cannot constitute an "occurrence" under liability policies triggered by an accident or an occurrence." It is important to note that the language of the homeowner policy in *Lenning* is identical to the policy language in KFB's policy with the Blevinses.
>
> The *Lenning* Court again held that "[D]efective workmanship standing alone, that is, resulting in damages only to the work product itself, is not an occurrence . . . the courts generally conclude that defective workmanship is not what is meant by the term 'accident' under the definition of [']occurrence'."
>
> Though, as a 6th Circuit case, *Lenning* is not binding upon this Court, it is instructive on the issue of homeowner insurance liability. "Kentucky Courts have held that the duty to defend is broader than the duty to indemnify. Insurers have an obligation to defend if there is an allegation 'which potentially, possibly or

> might come within the coverage of the policy.'" *Lenning*.
>
> This Court holds that breach of contract is not an "occurrence" under the KFB homeowner policy, and therefore KFB has no duty to defend the breach of contract issue.
>
> On the issue of defective workmanship, this Court holds that such is also not an "occurrence" under the policy, and therefore KFB has no duty to defend on this issue.
>
> With regard to the issue of fraudulent representation, the Court finds that there is a possible cause of action that could impose liability for Defendant KFB, obligating then to defend on this issue.
>
> **DECLARATORY JUDGMENT**
>
> The Court declares and holds that KFB has a duty to defend the action only on the issue of fraudulent misrepresentation under Counts II and III of the complaint. The Court further holds that KFB has no duty to defend under Count I on the issue of breach of contract, and likewise has no duty to defend on Counts IV and V on the issue of defective workmanship. This is a final and appealable judgment.

The parties, with the exception of Bays, all moved the circuit court to alter, amend or vacate the Declaratory Judgment. The circuit court denied the motions, but nevertheless amended the Declaratory Judgment as follows:

> The Court declares and holds that KFB has a duty to defend the action only on the issue of negligent misrepresentation under Counts II and III of the Complaint. The Court further holds that KFB has no duty to defend under Count I on the issue of breach of contract and likewise has no duty to defend on Counts IV and V on the issue of defective workmanship.

As in the previous Declaratory Judgment, the circuit court stated, "[t]his is a Final and Appealable Judgment[.]" These appeals followed.

On appeal, KFB first argues that a cause of action for negligent misrepresentation does not apply to private transactions, such as the one between the Blevinses and James and Fonda, so as to require it provide a defense and coverage under the policy.[1] KFB next argues, as it did below, that the property damage was not caused by an "occurrence" as defined in the policy. On cross-appeal, the Blevinses assert that the circuit court misapplied *Lenning* and should have determined that the damage caused by the entry of rainwater constituted an "occurrence" under the policy.

We need not reach the merits of these claims, but rather must address what we have determined to be a fatal jurisdictional issue. It is axiomatic that, with limited exceptions that do not apply here, an appeal may only be taken from an order or judgment that is final. *See* CR 73.02, CR 77.04(2). CR 54.01 defines a final and appealable judgment 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." CR 54.02(1), in turn, 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

[1] We note that the circuit court has not had the opportunity to determine whether the cause of action for negligent misrepresentation is applicable in this case.

just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final." We are mindful of the Supreme Court of Kentucky's recent statement that, "[i]t is fundamental that a court must have jurisdiction before it has authority to decide a case." *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005).

The present appeals solely concern the circuit court's Declaratory Judgment; the underlying civil action against the Blevinses and Bays is still pending and no final adjudication has been entered. Therefore, under CR 54.02, the Declaratory Judgment and Order amending the Declaratory Judgment were required to include the necessary recitals that the judgment was final and that there was no just reason for delay. Neither the Declaratory Judgment nor the Order included a recitation that there was no just reason for delay. Accordingly, the judgments appealed are not final, and we do not have the necessary subject matter jurisdiction to review these appeals.

For the foregoing reasons, the above styled appeal and cross-appeal are ORDERED DISMISSED. If, once a final judgment is entered, the parties opt to file notices of appeal or cross-appeal, they shall not be required to comply with all of the appellate steps, other than filing the required notice of appeal and paying the filing fee. Unless the parties notify the Clerk of this Court otherwise in a timely manner, upon the filing of the notice of appeal or cross-appeal, the Clerk of this Court is DIRECTED to TRANSFER all of the filings from the above-styled

appeals to the corresponding new appeal or cross-appeal. Upon submission, the case or cases shall be assigned to a three-judge merits panel with Judge Keller named as the presiding judge and Judges Thompson and Wine named as associate judges.

ALL CONCUR.

ENTERED: February 15, 2008 /S/ Michelle M. Keller
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT/CROSS-APPELLEES:

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BRIEF FOR APPELLEES/CROSS-APPELLANTS:

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