RENDERED: FEBRUARY 29, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-002400-MR

PROGRESSIVE NORTHERN INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 05-CI-00318

TANA DARNELL; RAYMOND SUTTLES, INDIVIDUALLY AND D/B/A RAY'S MOBILE HOME SERVICE; AND CHRISTOPHER W. SUTTLES — APPELLEES

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

KELLER, JUDGE: Progressive Northern Insurance Company has appealed from several orders of the Greenup Circuit Court related to its Petition for Declaratory Judgment. In its petition, Progressive sought a declaration as to whether it must provide coverage and a defense to the defendants named in a personal injury action. Because this appeal was taken from non-

final, non-appealable orders, we must dismiss the above-styled appeal.

The personal injury case underlying Progressive's declaratory action was filed by Tana Darnell. Darnell is seeking damages for injuries she sustained in an accident on August 15, 2004. Darnell was operating a motorcycle when she was struck by a 1992 Chevrolet Silverado truck driven by Christopher Suttles. The Silverado was owned by and registered to Christopher's wife, Dawn Renee Suttles, and was insured by a policy issued to Dawn's sister, Jennifer Beavis.[1] On May 20, 2005, Darnell filed a complaint in Greenup Circuit Court alleging that Christopher acted negligently in operating his motor vehicle. Darnell also alleged that Christopher was driving the vehicle during the course of his employment with Ray's Mobile Home Service, a business owned by Christopher's father, Raymond Suttles. In that count of her complaint, Darnell alleged that Raymond, both individually and doing business as Ray's Mobile Home Service, was vicariously liable for Christopher's negligence. Finally, Darnell named State Farm Mutual Automobile Insurance Company, which issued policies to her providing underinsurance coverage. All of the defendants filed answers to Darnell's complaint.

Turning to Progressive's involvement in this case, the record reflects that Raymond obtained a Commercial Auto

[1] Coincidentally, Progressive issued the personal automobile policy under which the Silverado was insured.

Insurance policy[2] from Progressive to cover vehicles used for Ray's Mobile Home Service. The only insured vehicle listed on the policy issued May 1, 2004, was a 1995 White GMC Wia. This was a semi-tractor/trailer used to tow mobile homes. The policy includes a definition of an insured auto as follows:

> a. Any **auto** described in the Declarations or any **replacement auto**. The same coverages and limits will apply to the **replacement auto** as applied to the **auto** being replaced, until **you** notify **us**. **You** must, however, notify **us** within 30 days of replacement for coverage to continue to apply. Once ownership in the original auto is transferred or it becomes permanently inoperable, this policy no longer applies to it.
>
> b. Any additional **auto** of which **you** acquire ownership during the policy period provided that: 1) if the **auto** is used in **your** business, **we** must insure all other **autos you** own and that have been used in **your** business, and 2) if the **auto** is not used in **your** business, **we** must insure all other **autos you** own. The same coverages and limits will apply to the additionally acquired **auto** as apply to **your** other **autos** on the policy, ...
>
> . . .
>
> c. Any **non-owned auto** while **you** or an employee of **yours** is temporarily driving it as a substitute for any other **auto** described in this definition because of its withdrawal from normal use for a period of not greater than 30 days without notification to **us** due to breakdown, repair, servicing, **loss**, or destruction. . . .

Coverage under this commercial policy is at issue in the declaratory action and this appeal.

[2] No. 01211882-2.

On December 7, 2005, the circuit court permitted Progressive to file an Intervening Petition for Declaratory Judgment. In the petition, Progressive sought a declaration that its commercial policy for Ray's Mobile Home Service did not provide coverage for the August 15, 2004, accident and that it did not owe the defendants a defense in Darnell's personal injury claim. Throughout the declaratory portion of the claim, Progressive has maintained that it did not owe coverage or a defense for two reasons: 1) the vehicle was not purchased, owned, or insured under any policy Raymond held, but was owned and registered under Christopher's wife's name and insured under a separate personal automobile policy held by Jennifer Beavis; and 2) Christopher was not operating the vehicle within the scope of his employment with Ray's Mobile Home Service at the time of the accident. At this point and in an effort to simplify the explanation of the ensuing procedural steps below, we shall create a chart listing those steps in chronological order:

- January 3, 2006 – Darnell's Answer to Progressive's Intervening Petition filed.
- January 30, 2006 – Progressive's First Set of Interrogatories, Requests for Production of Documents, and Request for Admission propounded to Christopher. No responses ever filed.
- March 16, 2006 – Progressive's Motion for Summary Judgment filed.
- June 30, 2006 – Darnell's response to Progressive's Motion for Summary Judgment filed.

- July 5, 2006 – **Order** denying Progressive's Motion for Summary Judgment entered because a disputed factual issue exists regarding whether Christopher was driving the vehicle within the scope of employment for Ray's Mobile Home Service. No finality language included.

- July 17, 2006 – Progressive's motion to reconsider order denying its Motion for Summary Judgment filed.

- July 19, 2006 – Progressive's notice to Christopher and Raymond regarding pending declaratory action and of their right to seek independent counsel filed.

- September 1, 2006 – Progressive's Notice and Motion for Default Judgment against Christopher and Raymond filed.

- September 6, 2006 – Darnell's response to Progressive's motion to reconsider filed.

- September 7, 2006 – Progressive's reply to Darnell's response filed.

- September 7, 2006 – **Default Judgment** entered on Progressive's declaratory action; circuit court declares that policy does not provide coverage for accident and no defense is owed. Finality language included.

- September 12, 2006 – **Order** denying motion to reconsider order denying motion for summary judgment entered. No finality language included.

- September 18, 2006 – Darnell's motion to alter, amend, or vacate Default Judgment filed, citing inconsistent judgments.

- September 28, 2006 – Progressive's response to Darnell's motion to alter, amend, or vacate filed.

- October 4, 2006 – **Order** granting Darnell's motion to alter, amend, or vacate, and ordering that Progressive must provide coverage and a defense entered. Incomplete finality language included.

- October 16, 2006 – Progressive's motion to alter, amend, or vacate October 4, 2006, order filed, including alternative motion to make prior rulings on Progressive's Motion for Summary Judgment final and appealable.

- November 6, 2006 – **Order** denying Progressive's motion to alter, amend, or vacate entered. No mention of alternative motion. No finality language included.

- November 14, 2006 – Progressive's Notice of Appeal filed.

On appeal, Progressive continues to argue that the circuit court erred in denying its motion for summary judgment and abused its discretion in amending the default judgment because the commercial policy at issue does not provide for coverage or a defense for this accident.[3] No appellee briefs were filed in this matter.

Without reaching the merits of this case, we have determined that the orders from which this appeal was taken are inherently interlocutory. Thus, we do not have subject matter jurisdiction to review Progressive's appeal. In *Wilson v. Russell*, 162 S.W.3d 911, 913-14 (Ky. 2005), the Supreme Court addressed this issue in detail:

> 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.[4]

[3] We note that the videotapes of various hearings were not included in the certified record on appeal, despite Progressive's designation of such recordings in its Designation of Record on Appeal.

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 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.[5] 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."[6] As

[4] 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).

[5] CR 54.01. (Footnote 2 in original).

[6] *Hubbard v. Hubbard*, 303 Ky. 411, 197 S.W.2d 923 (1946). *See also* Kentucky Bar Foundation, Kentucky Appellate Practice § 21.03 (1985). (Footnote 3 in original).

> there is no final order or judgment from which to appeal, the Court of Appeals was without jurisdiction.[7] And it has long been a fundamental maxim that a court will not assume jurisdiction where it does not exist.[8]

We have also reviewed *Brumley v. Lewis*, 340 S.W.2d 599, 600 (Ky. 1960)(quoting *Hackney v. Hackney*, 327 S.W.2d 570, 571 (Ky. 1959)), in which the former Court of Appeals stated:

> [T]he final and appealable character of an order should be tested on the basis of 'whether the order grants or denies the ultimate relief sought in the action or requires further steps to be taken in order that the parties' rights may be finally determined.'

In the present case, none of the orders from which Progressive appealed are final or appealable, or are even capable of being made final and appealable. Despite what Progressive stated in its brief that no factual dispute existed, the circuit court held in its July 5 and October 4, 2006, orders that a factual dispute existed regarding whether Christopher was operating the vehicle in the scope of his employment at the time of the accident. Regardless of whether the holding that a factual issue existed was right or wrong, the issue must be completely adjudicated before it is ripe for review. As an

[7] *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."). (Footnote 4 in original).

[8] *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."). (Footnote 5 in original).

aside, we note that had no factual dispute existed and had the circuit court ruled on the summary judgment motion as a matter of law, the July and October rulings still would not have been subject to review because neither of the orders contained the necessary language to make them final and appealable pursuant to CR 54.02. Therefore, we must dismiss this appeal as interlocutory.

Despite this holding, we must point out what we consider to be an inadvertent mistake in the circuit court's October 4, 2006, order, which does not relate to any of the misstatements of fact and law mentioned in Progressive's motion to alter, amend, or vacate that order. The October 4th order addressed Darnell's motion to alter, amend, or vacate the default judgment and ultimately ordered Progressive to provide coverage and a defense to the defendants on damages. In doing so, the circuit court stated:

> As a result of this ruling it is necessary for Progressive Northern Insurance Company to provide a defense in this case. Since the court entered a default judgment against the defendants, Christopher Suttles, Raymond Suttles, and Ray's Mobile Home Service, then the issue of damages must also be decided by the jury, unless the parties agree to submit the issue before the Court.

The circuit court went on to state:

> IT IS FURTHER ORDERED THAT, when the case goes to trial the issues submitted to the jury will be the question of damages, and whether the defendant, Christopher Suttles was acting within the scope of his employment when he was driving the vehicle at the time of the collision.

Based upon our review of the record, the circuit court entered a default judgment SOLELY in the declaratory action filed by Progressive. It did not make a ruling on liability. Furthermore, we note that there is no dispute that Christopher and Raymond filed answers to Darnell's personal injury suit and there is nothing in the record to indicate that liability on Darnell's personal injury action has been decided.

Based on the above, and in our view, the circuit court must first resolve the factual issue concerning coverage in the declaratory action; namely, whether Christopher was operating the vehicle in the scope of his employment for purposes of coverage under the policy. Once that issue has been finally decided,[9] then the underlying personal injury action will be ready to proceed, which we recognize includes an allegation that Christopher was acting negligently in the course and scope of his employment. However, at this point the question as to whether Progressive will be providing coverage and a defense will necessarily depend upon the circuit court's final ruling in the declaratory action.

For the foregoing reasons, the above-styled appeal is ORDERED DISMISSED as interlocutory.

ALL CONCUR.

ENTERED: February 29, 2008 /s/ Judge Michele M. Keller

[9] In other words, the circuit court has issued a final order or judgment, including all of the necessary CR 54.02 language, resolving the declaratory action as a matter of law, and any appeal taken from that final order or judgment has been concluded.

JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

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No brief for appellees.