

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000730-MR

COMMONWEALTH OF KENTUCKY,
JUSTICE & PUBLIC SAFETY CABINET,
DEPARTMENT OF CORRECTIONS

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 06-CI-00812

CARLA J. PEAK

APPELLEE

AND

NO. 2007-CA-000738-MR

COMMONWEALTH OF KENTUCKY,
KENTUCKY PERSONNEL CABINET

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 06-CI-00812

CARLA J. PEAK

APPELLEE

OPINION AND ORDER
DISMISSING

** ** *

BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: In both above-styled appeals, appellants are seeking to appeal from a March 21, 2007, order of the Oldham Circuit Court denying appellants' motions to dismiss. In both motions, appellants sought to dismiss the action on the basis of sovereign immunity. Appellants concede that the above appeals are interlocutory but insist that such interlocutory appeals are authorized by a recent Court of Appeals decision in *Commonwealth v. Hall*, Appeal No. 2005-CA-000862-MR. Appellants argue that the Court in *Hall* held that an interlocutory appeal will lie from an order denying a sovereign immunity claim raised by the Commonwealth. However, on August 15, 2007, the Kentucky Supreme Court ordered the opinion of the Court of Appeals in *Commonwealth v. Hall*¹ not to be published (Appeal No. 2007-SC-0215-DG). As such, this opinion may not be relied upon as authority. Ky. R. Civ. P. (CR) 76.28.²

A final judgment or opinion is one that adjudicates all the rights of all parties or is made final under CR 54.02. CR 54.01. In this case, the March 21, 2007, order did not adjudicate all the rights of all the parties. Rather, the order merely denied a motion to dismiss the action. An order denying dismissal of an action is inherently interlocutory and non-appealable. *Gooden v. Gresham*, 6 Ky.Op. 560 (Ky. 1873)(holding

¹ We note that the facts of this case and *Commonwealth v. Hall*, Appeal No. 2005-CA-000862-MR are substantially different. In this case, appellee was discharged from employment while receiving workers' compensation benefits which raises novel issues not present in *Hall*. Additionally, in this case, appellee is seeking injunctive relief against appellants.

² Under Ky. R. Civ. P. 76.28(4)(c), an unpublished opinion may be cited as authority under some circumstances. However, we do not think it proper to cite *Commonwealth v. Hall*, Appeal No. 2005-CA-000862-MR as authority because the Kentucky Supreme Court ordered the opinion not to be published.

that the denial of a motion to dismiss is not a final order from which a party may appeal); *Parton v. Robinson*, 574 S.W.2d 679 (Ky.App. 1978)(holding that the denial of a motion to dismiss was not a final and appealable order); *see also Louisville Label Inc. v. Hildesheim*, 843 S.W.2d 321 (Ky. 1992)(holding that an order denying a motion for voluntary dismissal is not appealable and that the action below merely continues). We see no reason to deviate from this sound principal of law.

Now therefore be it ORDERED that Appeal Nos. 2007-CA-000730-MR and 2007-CA-000738-MR are DISMISSED.

KELLER, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPERATE OPINION.

ENTERED: February 15, 2008

/s/ Jeff S. Taylor
JUDGE, COURT OF APPEALS

VANMETER, JUDGE, DISSENTING: I respectfully dissent. While true that the Supreme Court ordered this Court's opinion in *Commonwealth of Kentucky, Transportation Cabinet v. Hall*, 2005-CA-000862-MR (Ky.App. Dec. 1, 2006) not to be published, its doing so does not necessarily indicate that the decision was unsound. Accordingly, I would proceed to the merits of this appeal for the reasons set forth in *Hall*. In that case, we held that "an order denying summary judgment on absolute or qualified immunity grounds is subject to immediate appellate review to the extent it raises purely legal issues." *Hall*, slip op. at 2; *see Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985) (holding that "denial of a claim of qualified

immunity, to the extent it turns on an issue of law, is an appealable ‘final decision’”); *see also Johnson v. Jones*, 515 U.S. 304, 313, 115 S.Ct. 2151, 2156, 132 L.Ed.2d 238 (1995) (emphasizing that to be immediately appealable, the qualified immunity issue must not involve a genuine factual dispute, but must be “a purely legal one”).

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