

*2012 Ohio 329, *; 2012 Ohio App. LEXIS 283, ***

JEFFREY S. WHITLEY, Plaintiff-Appellant, vs. PROGRESSIVE CASUALTY INSURANCE COMPANY, and PROGRESSIVE PREFERRED INSURANCE COMPANY, Defendants-Appellees. LORA N. WHITLEY, Plaintiff-Appellant, vs. PROGRESSIVE PREFERRED INSURANCE COMPANY, Defendant-Appellee.

APPEAL NO. C-110157, APPEAL NO. C-110168

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

2012 Ohio 329; 2012 Ohio App. LEXIS 283

February 1, 2012, Date of Judgment Entry on Appeal

NOTICE:

THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY: [1]**

Civil Appeals From: Hamilton County Court of Common Pleas. TRIAL NO. A-0811959. TRIAL NO. A-0811925.

Whitley v. Progressive Preferred Ins. Co., 2010 Ohio 356, 2010 Ohio App. LEXIS 299 (Ohio Ct. App., Hamilton County, Feb. 5, 2010)

DISPOSITION: Appeals Dismissed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, an insured and his wife, filed separate appeals from the judgment of the Hamilton County Court of Common Pleas (Ohio), which granted summary judgment to appellee insurer on the issue of whether an insurance policy excluded uninsured motorist (UIM) benefits to appellants where the tortfeasor was statutorily immune from liability.

OVERVIEW: Although the trial court granted summary judgment to the insurer on the issue of whether the policy excluded UIM benefits, the order did not resolve the wife's claims for medical payments coverage and uninsured or UIM coverage related to the insured's negligence. In dismissing the appeals, the court held that it lacked jurisdiction to reach the merits of the appeals as the wife's other claims for coverage remained pending, and the trial court did not certify that no just cause for delay existed, as required by Civ. R. 54(B). Therefore, appellants had filed an appeal from an order that was not final and appealable under R.C. 2505.02.

OUTCOME: The court dismissed the appeals.

CORE TERMS: tortfeasor, coverage, deputy, summary judgment, uninsured motorist benefits, substantial rights—, uninsured, immune, insurance policy, filed suit, award of damages, special proceeding, multiple claims, underinsured, consolidated, statutorily, declaration, motorcycle, collision, motorist, immunity, driven

LEXISNEXIS(R) HEADNOTES

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN1 Before a lower court's order can be reviewed on appeal, it must be final within the meaning of R.C. 2505.02 and meet the requirements of Civ. R. 54(B), if applicable.

Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN2 An action for declaratory judgment is a special proceeding. R.C. 2505.02(A)(2).

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN3 See R.C. 2505.02(B)(2).

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN4 R.C. 2505.02(A)(1) defines a "substantial right" as a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN5 Generally, Civ. R. 54(B) requires that a trial court order that disposes of fewer than all claims against all parties in a lawsuit involving multiple parties or multiple claims include a determination that there is no just reason for delay. Civ. R. 54(B).

COUNSEL: Manley Burke, LPA, Emily Supinger, Daniel J. McCarthy, and James M. Cooney, for Plaintiff-Appellant, Jeffrey S. Whitley.

Thomas J. Ruwe, for Plaintiff-Appellant, Lora N. Whitley.

Freund, Freeze & Arnold and Jennifer K. Nordstrom, for Defendants-Appellees, Progressive Casualty Insurance Company and Progressive Preferred Insurance Company.

JUDGES: HENDON, P.J., CUNNINGHAM and FISCHER, JJ., concur.

OPINION

Per Curiam.

[*P1] Plaintiffs-appellants Jeffrey S. and Lora N. Whitley appeal the summary judgment entered for defendants-appellees Progressive Preferred Insurance Company and Progressive Casualty Insurance Company ("Progressive") on the issue of whether a Progressive insurance policy excluded uninsured motorist benefits to Jeffrey and Lora where the tortfeasor was statutorily immune from liability. Because we lack jurisdiction to hear these appeals, we sua sponte dismiss them.

I. Background Facts

[*P2] In June 2005, a motor vehicle driven by an on-duty Hamilton County deputy sheriff and a motorcycle driven by Jeffrey collided. Jeffrey's spouse, Lora, was a passenger on his motorcycle. The Whitleys ****2** were seriously injured. A court determined that the deputy and the political subdivision that employed him were immune from liability under R.C. Chapter 2744. See *Whitley v. Progressive Preferred Ins. Co.*, 1st Dist. Nos. C-090240 and C-090284, 2010 Ohio 356.

[*P3] In the case numbered A-0811959, Jeffrey filed suit against Progressive, his insurer. He sought a declaration that he was entitled to uninsured motorist benefits as a result of the collision with the deputy, and an award of damages. In the case numbered A-0811925, Lora separately filed suit against Progressive. She sought a declaration that she was entitled to medical payments benefits and uninsured or underinsured motorist benefits under Jeffrey's policy as a result of the collision, and an award of damages. She alleged that the deputy and Jeffrey were both tortfeasors.

[*P4] At the request of the parties, the trial court consolidated the two cases under Civ.R. 42 (A). The court ordered that filings be made only in the case numbered A-0811925.

[*P5] Progressive moved for and was granted summary judgment in both cases on the issue of whether the insurance policy excluded uninsured motorist benefits where the tortfeasor was statutorily immune **[**3]** from liability. The trial court cited *Snyder v. Am. Family Ins. Co.*, 114 Ohio St.3d 239, 2007 Ohio 4004, 871 N.E.2d 574, in support of its decision. The order, however, did not resolve Lora's claims for medical payments coverage and uninsured or underinsured coverage related to Jeffrey's alleged negligence.

[*P6] These appeals followed. The Whitleys each challenge the summary judgment in a single assignment of error for our review.

II. Dismissal

[*P7] We lack jurisdiction to reach the merits of these claims. **HN1** Before a lower court's order can be reviewed on appeal, it must be final within the meaning of R.C. 2505.02 and meet the requirements of Civ.R. 54(B), if applicable. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 540 N.E.2d 266 (1989). In this case, the order appealed is final as defined by R.C. 2505.02(B)(2).¹ It affects substantial rights—the Whitleys' rights to uninsured motorist coverage and damages based on the statutory immunity of a tortfeasor. See R.C. 2505.02(A)(1).² And it was entered in **HN2** an action for declaratory judgment, which is a special proceeding. See *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009 Ohio 1221, 904 N.E.2d 863, ¶ 21, citing R.C. 2505.02(A)(2) and *Gen. [**4] Acc.*

FOOTNOTES

¹ R.C. 2505.02(B)(2) provides that **HN3** "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is * * * [a]n order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment."

² **HN4** R.C. 2505.02(A)(1) defines a "substantial right" as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect."

[*P8] But Civ.R. 54(B) applies because the consolidated cases involve multiple claims and multiple parties. See *Whitaker v. Kear*, 113 Ohio App.3d 611, 681 N.E.2d 973 (4th Dist.1996), citing *Mezerkor v. Mezerkor*, 70 Ohio St.3d 304, 308, 1994 Ohio 288, 638 N.E.2d 1007 (1994); *In re Consol. Mtge. Satisfaction Cases*, 1st Dist. No. C000114, 2000 Ohio App. LEXIS 5852 (Dec. 15, 2000).

[*P9] **HN5** Generally, Civ.R. 54(B) requires that a trial court order that disposes of fewer than all claims against all parties in a lawsuit involving multiple parties or multiple claims include a determination that "there is no just reason for delay." Civ.R. 54(B). See *Gen. Acc. at*

23; *but see Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009 Ohio 1971, 909 N.E.2d 88

[5]** ("R.C. 2744.02(C) permits a political subdivision to appeal a trial court order that denies it the benefit of an alleged immunity from liability, even when the order makes no determination pursuant to Civ.R. 54(B).")

[*P10] Lora's other claims for coverage remain pending, and the trial court did not certify that no just cause for delay existed, as required by Civ.R. 54(B). Therefore, Jeffrey and Lora have appealed from an order that is not final and appealable, and their appeals must be dismissed for lack of jurisdiction. *See Noble v. Colwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989); *Nationwide Mut. Ins. Co. v. Pragotrade, Inc.*, 8th Dist. No. 94497, 2010 Ohio 5603, ¶ 20-22.

Appeals dismissed.

HENDON, P.J., CUNNINGHAM and **FISCHER, JJ.**, concur.







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