NOT DESIGNATED FOR PUBLICATION

TROY M. TRAINA	*	**NO. 2002-CA-0240**
VERSUS	*	**COURT OF APPEAL**
JOHN KENNEY AND XYZ INSURANCE COMPANY,	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 75-153, DIVISION "C"
Honorable Wayne Cresap, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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APPEAL DISMISSED, WITHOUT PREJUDICE

Plaintiff, Troy M. Traina, appeals the trial court's grant of summary judgment in favor of defendant, Sheriff Jack Stephens (hereinafter Sheriff Stephens).

FACTS AND PROCEDURAL HISTORY:

This matter has previously been before this Court. *See Troy M. Traina v. John Kenney and XYZ Insurance Company*, 99-1460 (La. App. 4 Cir. 8/23/00), *unpub.* The following facts and procedural history are excerpted from our earlier opinion:

> Troy Traina filed suit against John Kenney, an off-duty St. Bernard Parish Sheriff's deputy, seeking damages for injuries sustained when Mr. Kenney allegedly intentionally shot Mr. Traina. Mr. Traina later amended his petition to add Jack Stephens, individually, and as sheriff of St. Bernard Parish, alleging negligent hiring, training and commissioning of Mr. Kenney.
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> After answering the amended petition on March 30, 1995, and conducting copious discovery, defendant Jack Stephens filed a motion for summary judgment on September 8, 1998. The sheriff averred that he could not be held vicariously liable for Mr. Kenney's actions because Mr. Kenney was off-duty at the time of the incident, and the injury-causing weapon was not Mr. Kenney's service revolver, but was, in fact, his personal property. Additionally, the sheriff could not be held liable for the negligent hiring or training of Mr. Kenney because the incident was entirely outside the scope of Mr. Kenney's employment with the sheriff's office. After a hearing

on September 25, 1998, Sheriff Stephens' motion was denied.

On the day of trial, the sheriff verbally reurged his motion for summary judgment, submitting to the court for consideration a recently decided case, *Russell v. Noullet*, 98-0816 (La. 12/1/98), 721 So.2d 868. Before trial began, the trial court granted the sheriff's motion and dismissed him from the case. A judgment was signed on February 3, 1999.

Prior to the rendering of the written judgment, Mr. Traina filed a Motion for New Trial for Argument on Motion for Summary Judgment. After a hearing on March 25, 1999, the trial court rendered judgment denying Mr. Traina's motion, and again dismissing the claims against Sheriff Stephens.

On April 29, 1999, Mr. Traina filed a Motion and Order for Appeal, which was signed by the trial court on May 3, assigning June 8 as a return date. No further pleadings were filed into the trial court record.

Troy Traina filed his appellant brief on August 20, 1999, and simultaneously filed a Motion to Supplement the Record on Appeal and for Oral Argument. The document with which the parties seek to supplement the record is entitled "Joint Stipulation." The Motion indicates that the parties agreed to certification of the judgment for appeal at the time the judgment was granted, but that the Joint Stipulation was filed into the record after the record was certified for appeal. The joint stipulation is signed by counsel for both parties, is not dated in any way, and has a lower court caption on it. However, there is no indication that the pleading was ever filed into the trial court record. As noted above, the trial court record does not contain the Joint Stipulation.

At the time the judgment was rendered and this appeal was filed, La. Code Civ. Proc. art. 1915 B specified that a judgment dismissing "less than all of the claims . . . or parties" does not constitute a final, appealable judgment unless certified by the trial court or by agreement of the parties. *See Jackson v. America's Favorite Chicken Co.*, 98-0605 (La.App. 4 Cir. 2/3/99), 729 So.2d 1060, and cases cited therein. Further, an agreement of the parties must be clear from the record. An express certification or agreement to consider the partial judgment as final must be of record when **the appeal is first filed.** Failing these requirements, appeals from partial judgments will be dismissed. *Jackson, supra* at 98-0605, p. 11,

729 So.2d at 1066 (emphasis in original).

> In this case, neither the February 3, 1999 judgment nor the March 27, 1999 judgment was certified as a final and appealable judgment by the trial court. Further, **there is nothing in the record prior to the filing of the appeal** to indicate that the parties agreed to stipulate that the subject judgment was final and appealable. Accordingly, this appeal must be dismissed without prejudice. Pursuant to La. Code Civ. Proc. art. 1915 B(2), all rights to appellate review are reserved until rendition of a final and appealable judgment.

For the above-cited reasons, this Court dismissed Mr. Traina's first appeal, without prejudice, on August 23, 2000. *Id.* at pp. 1-3.

Nearly one year after rendition of that decision, on July 18, 2001, Mr. Traina filed in the trial court a "Motion to Certify Summary Judgment as a Final Judgment Pursuant to C.C.P. Article 1915(B)." The court set plaintiff's motion for contradictory hearing. The record contains an Order dated October 1, 2001 wherein the trial judge ordered "that the two Judgments noted above are file [sic] and appealable judgments and that there is no just cause for delay in the appeal of this matter hereby certifying those judgements [sic] as final judgments pursuant to C.C.P. Article 1915(B)." The record also contains a Judgment dated November 8, 2001, which provided as follows:

> On motion of MICHAEL C. GINART, JR. attorney for plaintiff, TROY M. TRAINA, and on producing to the Court due proof in support of the plaintiff's demands, the Court considering the law and the evidence to be in favor of the movers, for the reasons this day orally assigned.
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> **IT IS ORDERED ADJUDGED AND DECREED** that

> the Motion for Summary Judgment granted to Sheriff Jack Stephens and against plaintiff, Troy M. Traina, signed February 3, 1999, and filed February 10, 1999, as well as the Judgment on Plaintiff's Motion for New Trial (considered by the Court to be a Motion for Reconsideration) denying Plaintiff's motion dated March 27, 1999, and filed April 6, 1999, as final judgments for the purposes of appeal pursuant to Article 1915 be now certified and made final and, accordingly, let there be judgment herein in favor of the plaintiff, TROY M. TRAINA and against JOHN KENNEY AND XYZ INSURANCE COMPANY.

Plaintiff, in his Notice of Appeal filed November 5, 2001, sought to appeal "from the judgment entered in this action on the ___ day of October, 2001" which addressed the Motion for Summary Judgment granted to Sheriff Stephens and the Judgment on Plaintiff's Motion for New Trial.

DISCUSSION:

The first issue that must be addressed in this appeal is whether the November 8, 2001 judgment is a final, appealable judgment under La. Code Civ. Proc. art. 1915.

As we noted previously when plaintiff first sought to appeal the trial court's grant of summary judgment in favor of Sheriff Stephens and its denial of plaintiff's motion for new trial in 1999, art. 1915(B) specified that a judgment dismissing less than all of the claims or parties does not constitute a final, appealable judgment unless it is certified by the trial court or by agreement of the parties. *See Troy M. Traina v. John Kenney and XYZ*

Insurance Company, 99-1460 (La.App. 4 Cir. 8/23/00), *unpub*. As we also noted therein, an express certification to consider a partial judgment as final must be of record when **the appeal is first filed.** *See Jackson v. America's Favorite Chicken Co.*, 98-0605 (La.App. 4 Cir. 2/3/99), 729 So.2d 1060.

Although plaintiff purports to be appealing the November 8, 2001 judgment, it is clear from his brief to this Court that he is actually appealing the merits of the trial court's grant of summary judgment in favor of Sheriff Stephens, as well as that court's denial of his motion for new trial. This conclusion is bolstered by the fact that it was the plaintiff himself who motioned the court to certify its earlier judgments as final. Thus, the trial court was ruling in plaintiff's favor when it certified those two judgments as final. In fact, the November 2001 judgment specifically provided that "there be judgment herein in favor of the plaintiff, TROY M. TRAINA and against JOHN KENNEY AND XYZ INSURANCE COMPANY."

In the case at bar, it does not appear that the complained of summary judgment or motion for new trial was re-argued before the trial court. Plaintiff merely moved to have the trial court certify that those two prior judgments were final pursuant to La. Code Civ. Proc. art 1915(B) after we dismissed his earlier appeal. Plaintiff is now before this Court once again seeking to appeal those original judgments under the guise of appealing the

November 2001 judgment certifying those 1999 judgments as final. As dictated by this Court in *Jackson*, the complained of partial judgment must be designated by the trial court as final **when the appeal is first filed**. *See also Deal v. Housing Authority of New Orleans*, 98-1530 (La.App. 4 Cir. 2/17/99), 735 So.2d 685. **Implicit in our holdings in *Deal* and *Jackson* is the notion that a party must obtain a designation that a partial judgment is final within the delays provided for applying for a new trial and/or for the taking of an appeal**. This Court's authority to hear and decide cases is strictly jurisdictional. The Code of Civil Procedure provides the delays within which a party may seek appellate review of a judgment of the trial court. This Court has traditionally and consistently strictly enforced those delays. A party cannot confer appellate jurisdiction in situations where it would otherwise not exist. To allow a party to seek appellate review of stale judgments, such as the two at issue herein, by convincing the trial court to certify or designate those stale judgments as final **at any time** after their rendition, totally circumvents the spirit of the Code of Civil Procedure. Our appellate jurisdiction cannot be manipulated in such a manner.

As we noted in *Jackson*, a party does not lose the right to appeal a partial judgment that is not certified as final; it merely loses the right to take

an immediate appeal of that partial judgment. *Jackson*, 98-0605, p.4, 729 So.2d at 1063.

Moreover, valid certification of a partial judgment as final requires that the trial court give explicit reasons on the record as to why there is no just reason for delay; mere conclusory statements do not suffice. La. Code Civ. Proc.art 1915 B (1); *Nalty v D.H. Holmes Co., Ltd.*, 99-2826, p.4-5 (La.App. 4 Cir. 12/27/00), 775 So.2d 695, 697; *Jackson*, 98-0605, p.8-9, 729 So.2d at 1065; *Montgomery v. Gosserand*, 98-1966 (La.App. 4 Cir. 12/23/98), 725 So.2d 92. In the instant case, both the trial court's order and its judgment designating the 1999 judgments as final failed to state that there was no just reason for delay.

CONCLUSION:

For the foregoing reasons, plaintiff's appeal is dismissed, without prejudice. Although plaintiff has lost the right to take an immediate appeal of the partial judgment granting summary judgment in favor of Sheriff Stephens, he does retain the right to appeal following rendition of judgment adjudicating all of the claims, rights and liabilities of all the parties. *See* La. Code Civ. Proc. art. 1915(B)(2).

APPEAL DISMISSED, WITHOUT PREJUDICE