

RENDERED: OCTOBER 15, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001660-MR

STATE AUTOMOBILE MUTUAL
INSURANCE COMPANY

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NOS. 07-CI-01592 & 08-CI-00445

OCCIDENTAL FIRE & CASUALTY
INSURANCE COMPANY; RALPH ROYER;
PARKER'S TRUCK CARE, INC.,
D/B/A PARKER TRUCK SALES AND
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

APPELLEES

AND

NO. 2009-CA-001661

OCCIDENTAL FIRE & CASUALTY
INSURANCE COMPANY

CROSS-APPELLANT

v.

CROSS-APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NOS. 07-CI-01592 & 08-CI-00445

OPINION
DISMISSING

** ** * * * * *

BEFORE: COMBS, KELLER AND LAMBERT, JUDGES

LAMBERT, JUDGE: This is a consolidated case arising from an automobile accident/personal injury lawsuit and a declaratory judgment action stemming from coverage issues between two insurers. Specifically, State Automobile Mutual Insurance Company appeals the Bullitt Circuit Court's order holding that Occidental Fire and Casualty Insurance Company had no duty to indemnify or defend William Boblitt in the underlying tort litigation. After careful review, we dismiss for failure to name an indispensable party and otherwise affirm the trial court's order.

This matter arose from an automobile accident in Bullitt County, Kentucky on July 14, 2007. The accident occurred when William Boblitt's vehicle went out of control, crossed the center line, and struck the vehicle driven by Ralph Royer. Parker's Truck Care, Inc. d/b/a Parker's Truck Sales, owned by Donald Parker, was the registered owner of the vehicle Boblitt was driving when the accident occurred. Parker was a licensed motor vehicle dealer pursuant to Kentucky Revised Statutes (KRS) 190.130.

Prior to 2007, Boblitt had an informal arrangement with Parker Truck Care and Parker whereby Boblitt was given permission to operate a vehicle from time to time, or to buy or sell a motor vehicle on Parker's behalf. On May 8, 2007, Parker contacted Jackie Holcomb, an insurance agent, to obtain a new liability insurance policy for Parker Truck Care. During that conversation, Ms. Holcomb completed an initial application that listed Boblitt as a potential driver. Unfortunately, coverage could not be bound through the initial broker, and a new application had to be submitted.

Ultimately, an application was later submitted to an underwriter at Occidental. During the application process, Occidental required Boblitt to obtain a completed medical form, attesting to his continued ability to drive, due to his age. Ms. Holcomb provided this form to Parker on June 14, 2007. Parker then provided the form to Boblitt, although Parker could not specifically recall when he gave the form to him. Parker testified that he told Boblitt that unless he returned the completed medical form, he could not drive any vehicle owned by Parker.

On July 9, 2007, three weeks after binding coverage and accepting the policy premiums, Occidental still had not received Boblitt's medical form and required Parker to sign a named driver exclusion, which was to be added to the policy. This exclusion stated, "With no change in premium, the insurance afforded by this policy shall not apply with respect to any claim arising from accidents which occur while any auto is being operated by Bill Boblitt."

Ms. Holcomb returned the named driver exclusion to Occidental on July 13, 2007, the day before the accident that is the basis of the underlying action. The named driver exclusion was not at any time counter-signed by Occidental, as the form itself requires.

Ultimately, Royer filed suit against Boblitt and Parker for injuries arising from the accident. When Occidental refused to defend Boblitt in the underlying action, State Auto agreed to defend him despite the fact that the vehicle involved in the accident was not insured under its policy. The only vehicle insured by Boblitt's State Auto policy was a 2000 Chrysler Concorde. State Auto chose to provide a defense to Boblitt, but commenced a declaratory judgment action wherein it alleged that it had no contractual duties to defend or indemnify its named insured, Boblitt.

State Auto argued that Occidental, as the liability carrier for Parker's Truck Care, had a duty to defend and indemnify Boblitt. State Auto also sought a determination that Occidental's policy provided primary coverage and State Auto's policy provided excess coverage only. Further, State Auto sought a declaration that, because Occidental refused to defend Boblitt, State Auto is entitled to reimbursement of its defense costs incurred in defending Boblitt throughout the underlying litigation. Finally, State Auto sought a declaration that, because Occidental's refusal to defend Boblitt and acknowledge coverage is contrary to well-established Kentucky law, State Auto is entitled to recovery of its fees and expenses incurred in bringing the declaratory judgment action.

Occidental has denied that it owed a duty to either defend or indemnify Boblitt based upon the existence of a named driver exclusion excluding Boblitt from coverage and the undisputed revocation of permission to drive the insured vehicle by its named insured, Parker, to Boblitt prior to the accident. The trial court held that Occidental's named driver exclusion was not enforceable under the facts of this case. However, because Boblitt did not have Parker's permission to operate the motor vehicle at the time of the accident, the trial court held that Occidental had no duty to provide a defense or otherwise indemnify Boblitt for the events that transpired in the accident. This appeal and cross-appeal now follow.

On appeal, State Auto asserts that the trial court correctly determined that the named driver exclusion is unenforceable. However, State Auto argues that the trial court erred as a matter of law in holding that Parker's verbal instruction to Boblitt that he should not operate the vehicle supersedes the statutorily mandated coverage under KRS 190.033. In response, Occidental asserts that State Auto's appeal is defective because the notice of appeal failed to include Boblitt as a party, and therefore the appeal must be dismissed. On its cross-appeal, Occidental argues that the trial court erred in failing to enforce the named driver endorsement, which was specifically intended to exclude liability coverage to Boblitt.

Upon consideration, we conclude that all indispensable parties are not within the jurisdiction of this Court, and therefore we must dismiss State Auto's appeal.

The jurisdictional rule set forth in *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990), mandates that all indispensable parties must be timely and

specifically named as parties in the notice of appeal. *Id.* at 957. Strict compliance with this mandate is necessary to avoid dismissal pursuant to the following language set forth in CR 73.02(2): “The failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial.” *Id.* In *Stallings, supra*, dismissal of the appeal was ordered where two indispensable parties were not specifically named as parties in the notice of appeal, even though these parties were served with copies of the notice and subsequent pleadings in the appeal. *Id.*

In the instant case, Boblitt was not named on the notice of appeal, and State Auto subsequently filed a motion to file an amended notice of appeal naming Boblitt, which was denied by this Court. Now State Auto contends that Boblitt is not a necessary party to this appeal, arguing that Boblitt will not be affected by this Court’s decision. According to State Auto, if this Court reverses the trial court, Occidental will assume Boblitt’s defense in the underlying action and pay whatever damages are assessed by the jury, up to its policy limit. If this Court affirms the trial court, State Auto claims it will continue to defend Boblitt and pay whatever damages are assessed by the jury up to its policy limits.

We find this argument to be somewhat attenuated, given that Boblitt’s State Auto policy did not cover the vehicle Boblitt was driving in this accident and it sought the declaratory judgment to determine that Occidental’s policy provided coverage. State Auto further contends that Boblitt can never be personally held liable for any damages assessed in excess of either policy limits, due to the fact

that he filed bankruptcy and was discharged from any personal liability for injuries or damages from this accident.

Upon consideration, it is apparent that Boblitt is an indispensable party to this appeal. “An indispensable party is one whose absence prevents the Court from granting complete relief among those already parties ... [or] one whose interest would be divested by an adverse judgment.” *Liquor Outlet, LLC v. Alcoholic Beverage Control Bd.*, 141 S.W.3d 378, 387 (Ky. App. 2004) (internal citations omitted).

Clearly, Boblitt’s interests in this litigation would be divested by an adverse judgment. Even assuming Boblitt’s debts are discharged in bankruptcy, a judgment in excess of any policy limits is still a judgment against him, and any judgment is inherently adverse to Boblitt’s interests. As it now stands, Boblitt would be unable to appeal any judgment of this Court designating that he has no insurance coverage for this accident because he is not a party to the appeal. Accordingly, we are obligated to dismiss State Auto’s appeal for failure to name an indispensable party.

In its cross-appeal, Occidental argues that the named driver exclusion contained in its policy is valid and effective in Kentucky, and therefore, the trial court erred as a matter of law in finding the exclusion inapplicable. Given that the trial court ruled for Occidental on other grounds, this argument is now moot and shall not be addressed.

For the foregoing reasons, we dismiss State Auto's appeal for failure to name an indispensable party.

ALL CONCUR.

BRIEF FOR APPELLANT/
CROSS-APPELLEE:

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BRIEF FOR APPELLEE/
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