

RENDERED: DECEMBER 11, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001651-MR

UNIVERSITY OF LOUISVILLE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NOS. 13-CI-01282, 13-CI-01296, AND
13-CI-01297

SHARON P. CLARK, IN HER
CAPACITY AS COMMISSIONER,
KENTUCKY DEPARTMENT OF
INSURANCE

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: CLAYTON, KRAMER, AND STUMBO, JUDGES.

KRAMER, JUDGE: University of Louisville (“U of L”) appeals an order of the Fayette Circuit Court. Upon review, we dismiss its appeal.

The facts and procedural history of this case are largely undisputed.

The Kentucky School Boards Association created the Kentucky School Boards Insurance Trust (“KSBIT”) in 1978, under the authority of Kentucky Revised Statutes (KRS) 342.350(4), KRS 304.50-010, and KRS 304.48-030, as a risk pool to collectively insure participating members (including appellant U of L). Until July 2007, KSBIT operated four separate insurance funds which respectively related to (1) workers’ compensation; (2) property; (3) liability; and (4) unemployment. In 2007, the KSBIT Board of Trustees merged the property and liability funds. Each fund assessed its own premium and maintained its own membership, and participating school districts made contributions to the funds based upon premium rates as determined by the particular fund.

In 2009, the Kentucky Department of Insurance ordered KSBIT to assess its members or otherwise find capital to offset deficits discovered in the KSBIT funds. In response, KSBIT, the Kentucky League of Cities Insurance Services (“KLCIS”) and the Kentucky League of Cities (“KLC”) entered into an agreement authorizing KLC and KLCIS to administer the KSBIT funds. In return, KLC infused KSBIT with capital and took official control of the KSBIT Board. The agreement among KLC, KLCIS and KSBIT also obligated the parties to execute a loan in the form of notes (“surplus notes”) in the amount of \$2,500,000 from KLCIS to KSBIT for its property and liability Fund, and \$5,500,000 from KLCIS to KSBIT for its workers’ compensation fund. Nevertheless, even after

KLC took over administration and control of KSBIT, the KSBIT insurance funds' financial difficulties worsened.

KSBIT, KLCIS, and KLC filed Civil Action No. 13-CI-01282 in the Franklin Circuit Court, seeking to compel the Kentucky Department of Insurance ("KDOI") and Sharon P. Clark, in her official capacity as Commissioner, to order assessments of the KSBIT members, including U of L, in the amount of \$8 million for the purpose of repaying the aforementioned surplus notes. KDOI subsequently filed Civil Action Nos. 13-CI-0296 and 13-CI-01297, also in Franklin Circuit Court, for the purpose of securing orders respectively placing the workers' compensation fund and property and liability fund into rehabilitation. These three civil actions were then generally consolidated.

As part of the ensuing rehabilitation proceedings, KSBIT and KDOI proposed plans to assess participants in the KSBIT insurance funds to account for the operating deficits until all liabilities of the funds were discharged. Sharon P. Clark, in her official capacity as Commissioner of the KDOI and as the appointed rehabilitator of the KSBIT funds (the "Rehabilitator") set forth a competing rehabilitation plan.

U of L intervened in this matter post-judgment, and its appeal takes issue with the fact that the circuit court ultimately directed the adoption of the Rehabilitator's plan, as opposed to KSBIT's and KDOI's plan, regarding the

KSBIT property and liability fund; U of L argues that the circuit court erred in doing so because the Rehabilitator's plan was inequitable.

But, we do not address U of L's argument because its appeal is interlocutory.

A final and appealable judgment is one that adjudicates all the rights of all the parties or is made final under Kentucky Rules of Civil Procedure (CR) 54.02. *See* CR 54.01. In an action involving multiple claims and/or multiple parties, CR 54.02 permits the trial court to make an otherwise interlocutory order final and appealable in certain circumstances. However, under CR 54.02, an interlocutory order may only be made final and appealable if the order includes both recitations—(1) there is no just cause for delay, and (2) the decision is final. It is well recognized that strict compliance with the rule is required. *Peters v. Bd. of Educ.*, 378 S.W.2d 638 (Ky. 1964). A court's failure to include both recitations in a judgment renders it interlocutory and non-appealable. *Turner Constr. Co. v. Smith Bros., Inc.*, 295 S.W.2d 569 (Ky. 1956). The Kentucky Supreme Court has recently upheld the requirement that both recitations must be made by the trial court to make an otherwise interlocutory order final. *Watson v. Best Fin. Servs., Inc.*, 245 S.W.3d 722 (Ky. 2008); *see also Mitchell v. Mitchell*, 360 S.W.3d 220, 221-222 (Ky. 2012) (explaining an order adjudicating less than all claims, but

reciting it was “final and appealable,” was nevertheless interlocutory because it did not also recite that there was “no just reason for delay.”¹

Here, the underlying case involves multiple claims and multiple parties. In an order entered May 13, 2014, the circuit court adjudicated which of the two competing property and liability assessment plans should be adopted, but its order did not contain the necessary recitations—that there is no just cause for delay and that the judgment was final as required by CR 54.02. Likewise, the circuit court entered a September 11, 2014 order that purported to make the prior May 13, 2014 order final and appealable, but this subsequent order did not state “there is no just cause for delay.” This language was essential because, as U of L indicates in a footnote of its appellate brief, claims in this consolidated action remain pending before the circuit court:

The petitions for rehabilitation also included a request for a judgment declaring the Surplus Notes unenforceable. Consideration of the issue of the enforceability of the Surplus Notes was stayed pending approval of an assessment plan. That issue is now being litigated, and if the court below determines the Surplus Notes are enforceable, U of L will be subject to an additional assessment for its proportionate share of the Surplus Notes.

¹ More recently, this Court also reemphasized these requirements in *McCormick v. James Scott Reed Revocable Trust*, No. 2012-CA-001135-MR, 2014 WL 272412 at *2 (Ky. App. Jan. 24, 2014) (“Unfortunately, the summary judgment did not contain the required CR 54.02 recitations—that there was no just cause for delay and that the judgment was final. Obviously, the circuit court has not reviewed the application of CR 54.02 to this case. Accordingly, this Court has no jurisdiction to entertain this appeal.”)

In short, the circuit court’s judgment did not adjudicate all the claims between all the parties; rather, it was only a partial judgment that did not contain the required CR 54.02 recitations, and it was accordingly interlocutory and non-appealable. *See also Melone v. Morgan*, 676 S.W.2d 805, 806 (Ky. App. 1984) (explaining where actions are consolidated generally, they have become one action and an order adjudicating less than all claims presented “would have to include CR 54.02 recitations to be a final and appealable judgment.”). Consequently, this Court has no jurisdiction to entertain this appeal.

For the reasons stated, it is hereby ORDERED that Appeal No. 2014–CA–001651–MR is hereby DISMISSED as being taken from an interlocutory and non-appealable order.

ALL CONCUR.

ENTERED: _____

JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Robert T. Watson
Amy D. Cabbage
Benjamin L. Riddle
Louisville, Kentucky

BRIEF FOR APPELLEE:

Peter F. Ervin
Shaun T. Orme
Jacqueline Heyman
Frankfort, Kentucky

BRIEF FOR MADISON COUNTY
BOARD OF EDUCATION, AMICUS
CURIAE:

Robert A. Morrin
Richmond, Kentucky