

GRADY MCKENZIE, ET AL., Plaintiff-Appellee v. GARY PAYNE, Defendant-Appellant

NO. 83610

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY**

2004 Ohio 2341; 2004 Ohio App. LEXIS 2087

May 6, 2004, Date of Announcement of Decision

SUBSEQUENT HISTORY: Subsequent appeal at, Remanded by *McKenzie v. Payne, 2005 Ohio 5127, 2005 Ohio App. LEXIS 4634 (Ohio Ct. App., Cuyahoga County, Sept. 29, 2005)*

PRIOR HISTORY: [*1] Civil Appeal from Common Pleas Court, Case No. CV-469330.

DISPOSITION: Dismissed.

COUNSEL: For Plaintiff-Appellee [Grady McKenzie]: Jeffrey H. Slavin, Cleveland, Ohio. Timothy J. Fitzgerald, Holly Olarczuk-Smith, James T. Tyminski, Jr., Gallagher, Sharp, Fulton & Norman, Cleveland, Ohio.

For Third-Party Defendant [Geico]: Patrick J. Quallich, Timothy G. Sweeney Bonezzi, Switzer Murphy & Polito Co., Cleveland, Ohio.

For Defendant [Nationwide Insurance Co.]: Deitri E. Villarreal, Williams Sennett & Scully, Twinsburg, Ohio.

For Defendant [Nationwide Protective Baker & Hostetler LLP Services, Inc.]: Leigh O. Houston, Columbus, Ohio.

For Defendant-Appellant [Gary Payne]: Ronald V. Rawlin, Rawlin, Gravens & Franey Co. LPA, Cleveland, OH. Lynn A. Lazzaro, Rocky River, Ohio.

JUDGES: DIANE KARPINSKI, PRESIDING JUDGE. TIMOTHY E. MCMONAGLE and ANTHONY O. CALABRESE, JR., JJ., concur.

OPINIONBY: DIANE KARPINSKI

OPINION:

JOURNAL ENTRY AND OPINION
KARPINSKI, P.J.

[*P1] Defendant, Gary Payne, appeals the jury's verdict that he was negligent in causing a motor vehicle accident in which plaintiff, Grady McKenzie and co-plaintiff, Ruby Stover, were injured.

[*P2] Before addressing the [**2] assignments of error, however, we must first determine whether there is a final appealable order to satisfy *R.C. 2505.02 n1* and *Civ. R. 54(B)*. Plaintiff has raised this issue in his pending motion to dismiss.

n1 *R.C. 2505.02(B)* provides:

An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(A) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in

favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action.

[**3]

[*P3] Relevant to the case at bar is plaintiffs' amended complaint (the "complaint"). In that pleading, Grady and Stover alleged that they suffered personal injuries caused by defendant's negligence. n2 The complaint included claims by Grady's spouse and co-plaintiff, Eddy McKenzie, for property damage n3 and loss of consortium. Plaintiffs also included a third-party complaint in which they asserted that defendant was an underinsured driver. Plaintiffs added Geico Insurance Company as a third-party defendant because, when the accident occurred, Geico was Grady's underinsured motor vehicle carrier.

n2 Grady and Stover were riding in a motor vehicle owned by co-plaintiff, Eddy McKenzie. Grady was driving and Stover was a passenger.

n3 He is the owner of the vehicle driven by Grady when the accident occurred.

[*P4] Just before trial, the parties entered into a Stipulated Agreement and Order of the Trial Court in which the parties agreed that the trial would be on the issue of liability only as [**4] between Grady and defendant. The agreement also stated:

[*P5] **"It is further stipulated that all claims against Geico for underinsured motorist coverage shall be determined by a subsequent proceeding in which right to trial by jury on behalf of any party shall be preserved. It is further stipulated that plaintiff Grady McKenzie has settled and released Nationwide Protective Service without prior notice to Geico. All parties agree and stipulate that third-party defendant Geico shall be granted leave to amend its Answer to assert impairment of subrogation rights as a defense, and leave to file a claim against Nationwide Protective Service seeking to assert claims against Nationwide Protective Service for indemnification,**

contribution, declaratory judgment, and respondeat superior liability. It is the order of this Court that Geico be bifurcated, that leave be given to Geico to amend its Answer as set forth in this stipulation, and that all such proceedings shall be held subsequent to the liability only determination between plaintiff and defendant."

[*P6] The case proceeded to a jury trial on the sole issue of liability. The jury returned a verdict finding Grady 5% [**5] negligent and Payne 95 percent negligent. The trial court then issued a *Civ.R. 54(B)* entry stating there was "no just cause for delay" of this appeal.

[*P7] "An order which adjudicates one or more but fewer than all the claims or the rights and liabilities of fewer than all the parties must meet the requirements of *R.C. 2505.02* in order to be final and appealable." *Noble v. Colwell (1989)*, 44 Ohio St.3d 92, 540 N.E.2d 1381, at syllabus. If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and the appeal must be dismissed. *Noble, at 94*.

[*P8] In *State ex rel. White v. Cuyahoga Metro. Hous. Auth. (1997)*, 79 Ohio St.3d 543, 546, 1997 Ohio 366, 684 N.E.2d 72, the Ohio Supreme Court stated that generally "orders determining liability in the plaintiffs' *** favor and deferring the issue of damages are not final appealable orders under *R.C. 2505.02* because they do not determine the action or prevent a judgment." *Id.* None of the other requirements set forth in *R.C. 2505.02* are applicable either. *State ex rel. White v. Cuyahoga Metro. Hous. Auth. (1997)*, 79 Ohio St.3d 543, 1997 Ohio 366, 684 N.E.2d 72. [*6] Because the trial court bifurcated the issues of liability and damages in this case, there is no final appealable order.

[*P9] Further, even if *Civ.R. 54(B)* language has been used by the trial court, the finding of liability is not a final appealable order, because, although the issue of liability was determined, a factual adjudication of relief was left unresolved. *Noble v. Colwell (1989)*, 44 Ohio St. 3d 92, 540 N.E.2d 1381.

[*P10] *Civ.R. 54(B)* provides:

[*P11] **"When more than one claim for relief is presented in an action whether as a claim, counter-claim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than**

all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." [**7]

[*P12] In the case at bar, unadjudicated claims remain against various parties. First, the trial court never addressed the merits of plaintiff, Eddy McKenzie's loss of consortium claim. *Lee v. Joseph Horne Co. (1995)*, 99 Ohio App.3d 319, 650 N.E.2d 530. Second, plaintiffs' underinsured coverage claim remains pending against Geico. These claims are not rendered moot by the jury's verdict nor are they fully resolved by entry of judgment on that verdict.

[*P13] Despite the parties' stipulated agreement, two of plaintiffs' claims remain pending. The trial court's order, therefore, even though it included *Civ.R. 54(B)* language, did not create a final appealable order from which an appeal can be taken. The jury's verdict, therefore, remains an interlocutory order rather than a final appealable order and jurisdiction remains with the trial court.

[*P14] Pursuant to *R.C. 2505.02* and *Civ. R. 54(B)*, this [**8] court does not have jurisdiction to consider this action on appeal.

[*P15] Accordingly, this appeal is dismissed.

Appeal dismissed.

TIMOTHY E. MCMONAGLE and ANTHONY O. CALABRESE, JR., JJ., concur.

It is ordered that appellee recover from appellant costs herein taxed.

It is ordered that a special mandate be sent to the Cuyahoga County Common Pleas Court directing said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

DIANE KARPINSKI

PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D) and 26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the [**9] Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S. Ct. Prac.R. II, Section 2(A)(1)*.