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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000542-MR

BITUMINOUS CASUALTY CORPORATION — APPELLANT

v. — APPEAL FROM MAGOFFIN CIRCUIT COURT
ACTION NO. 07-CI-00006

ESTATE OF LAHOMA SALYER BRAMBLE — APPELLEES

AND — NO. 2011-CA-000643-MR

GREENWICH INSURANCE COMPANY — APPELLANT

v. — APPEAL FROM MAGOFFIN CIRCUIT COURT
ACTION NO. 07-CI-00006

ESTATE OF LAHOMA SALYER BRAMBLE — APPELLEES

OPINION AND ORDER
DISMISSING APPEAL

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

ACREE, CHIEF JUDGE: Appellants Greenwich Insurance Company and Bituminous Casualty Corporation filed separate motions pursuant to CR[1] 76.38(2) seeking reconsideration of this Court's September 3, 2013 order dismissing their separate appeals as interlocutory. By separate order, we granted the motions so that we may clarify our prior ruling, while also addressing the specific bases of the motions to reconsider. After reconsidering the September 3, 2013 order, we again dismiss the appeals as interlocutory.

A history of this case, as concerns the appellants, is necessary.

The underlying litigation was commenced in 2007. Initially, the appellants, insurance companies, were not named parties, but were aware of the litigation. A declaration of rights claim was included in the original Complaint (Count 2), reiterated in the First Amended Complaint (Count 1), again in the Second Amended Complaint (Count 1), and for the last time in the Third Amended Complaint (Count 1). This claim sought a declaration of the appellees' rights under a certain deed. No reference was ever made in these first four complaints to insurance contracts or coverage.

In 2010, with permission of the trial court, the appellees filed a fourth amended complaint naming the appellants as defendants for the first time.

The Fourth Amended Supplemental Complaint incorporated by reference the prior complaints, but did not explicitly assert or reassert any declaration of rights claim, of any kind, against any of the original defendants or

[1] Kentucky Rules of Civil Procedure.

against Bituminous or Greenwich. Allegations in the Fourth Amended Supplemental Complaint included the fact that summary judgments on liability had been entered as to certain original defendants, some of whom subsequently agreed to settle the claims, after which judgments were entered. The complaint went on to allege that certain policies of insurance issued by the appellants provided coverage for the claims settled by the appellants' insureds, but that the appellants proceeded in bad faith in satisfying those claims.

After setting forth these and other general allegations, the appellees stated four counts against each appellant. Both sets of claims against the appellants began as follows:

> Each and every allegation in this Fourth Amended Complaint is to be taken on its face and incorporated into each and every "Count." No "Count" as set forth in this Complaint is intended to stand alone . . . .

Separate claims were then set out, in pertinent part, as follows:

> Count I[2] – Violation of the Unfair Claims Settlement Practices Act, KRS[3] 304.12-230 . . . .
> Count II – Bad Faith against [appellants, under a common law theory] . . . .
>
> Count III – Punitive Damages against [appellants] . . . .
>
> Count IV – Violation of KRS 304.12-235 [failing to timely settle a claim] against [appellants] . . . .

The appellees' prayer for relief sought

[2] Claims against Greenwich were numbered I through IV and claims against Bituminous were numbered V through VIII. The sets of counts were essentially identical.

[3] Kentucky Revised Statutes.

> judgment against Greenwich and Bituminous . . . for emotional pain and suffering, inconvenience, stress and worry, statutory interest on the final claim payment at 12%, and attorneys fees under KRS 304.12-235 caused by Greenwich and Bituminous for violation of the Unfair Claims Settlement Practices Act, common law bad faith, fraud and other laws[,] punitive damages [and t]rial by jury.

Nowhere in this complaint did the appellees use the phrase "declaration of rights" or any similar language to assert any claim as they had in the prior complaints against the original defendants. Nowhere in this complaint did the appellees assert any claim or request relief under KRS 418.040 of Kentucky's Declaratory Judgment Act for a declaration of their third-party rights under the contracts of insurance between the appellants and their insureds.

Appellants did not file answers in the circuit court, and so there is no counterclaim seeking a declaratory judgment under KRS 418.040, or otherwise, as to the coverage of their insurance contracts. Instead, on May 12, 2010, the appellants filed a Joint Notice of Removal to federal court of the claims against them based on diversity of citizenship under 28 U.S.C.[4] § 1332. Pertinent portions of their Notice of Removal state as follows:

> The Fourth Amended Supplemental Complaint seeks judgment and damages against Bituminous and Greenwich . . . . The jurisdictional amount in controversy is satisfied in this case as Plaintiffs [appellees] claim damages of more than $75,000.

[4] United States Code.

The appellants made no mention of KRS 418.040 in this notice of removal to federal court.

After removal, appellants filed answers to the Fourth Amended Complaint in federal court.[5] No mention of KRS 418.040 is made in either answer. Neither appellant filed a counterclaim or cross-claim containing a declaration of rights action under KRS 418.040 or under the federal Declaratory Judgment Act, 28 U.S.C. § 2201. Rather, each appellant simply denied the specific paragraph of the amended complaint that alleged the insurance contracts in question cover the claims. Then, each appellant asserted that same denial as a separate affirmative defense. Denominating it "Fourth Defense," Bituminous asserts:

> Plaintiffs' claims are barred in whole or in part by the terms and provisions of Bituminous's Commercial Lines Policies issued to Anaconda [one of the original defendants] and Bituminous affirmatively asserts that no coverage was afforded under its policies issued to Anaconda for the claims of Plaintiffs [appellees herein].

Greenwich asserted a similar affirmative defense, also denominated "Fourth Defense," which ends by simply stating that "none of [its insurance] policies . . . provide coverage for the claims made by the Plaintiffs [appellees herein] as against [its insured]."

[5] Neither party has filed with the Magoffin Circuit Clerk any answer, or any copy of the answers filed in federal court. As in *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260 (Ky. App. 2005), we take judicial notice of the content of the federal clerk's docket sheets for these pleadings. All of the information contained in these docket sheets is available through the Public Access to Court Electronic Records (PACER) database, which may be accessed via the internet. *See Doe*, 173 S.W.2d at 265, 265 n.20 (describing PACER, the "electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts and from the U.S. Party/Case Index.").

On June 7, 2010, the Magoffin Circuit Court clerk entered in the record of this case the federal district court's order granting the motion by some appellees to remand the case from federal court back to Magoffin Circuit Court. The order indicates that removal was ordered for a lack of complete diversity. We could find no mention of a declaration of rights claim, counterclaim, cross-claim, or third-party claim in the federal case record.

Once the case was again in Magoffin Circuit Court, the appellees filed a "motion for partial summary judgment on the issue of [appellants'] obligation to afford coverage under the terms of their respective insurance policies[.]" Appellees made their motion pursuant to CR 56[6] which allowed them to seek summary judgment as to "all or any part" of a claim. CR 56.01. As stated in their motion, the part of their claim for which they sought judgment was "the first of three prongs of Kentucky's test for bad faith" – that the insurer be obligated to pay the claim under the terms of the insurance policy. *See Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993) (cited by appellees in their motion).

The appellants responded with cross-motions for partial summary judgment. Greenwich's cross-motion sought judgment "on the issues of coverage applicable to its policy of insurance with [its insured, an original defendant, and] ask[ed] that this Motion be considered as its Response and Objection to [appellees'] Motion for Partial Summary Judgment on the third-party bad faith issues." Greenwich stated that its policy did not cover the category of loss suffered

[6] No reference to CR 57, addressing declaratory judgments, can be found in the record.

by appellees ("intangibles such as royalties or economic loss") so that "there can be no coverage. As such, the first prong of *Wittmer* can never be met[.]"

Similarly, Bituminous filed a cross-motion for summary judgment, noting that appellees had "asserted claims for alleged bad faith and Unfair Claims Settlement Practices Act violations[.]" Also citing *Wittmer*, Bituminous recognized that the issue of the "insurer's obligation to pay a claim under the terms of its policy is an essential element of a bad faith claim."

Neither Greenwich nor Bituminous mentioned KRS 418.040 or CR 57 (addressing declaratory judgments) in their cross-motions for summary judgment, effectively acknowledging that they were addressing the issue as the pleadings framed it – one element of a claim of liability and their defense to it.

On January 11, 2011, the Magoffin Circuit Court ruled on these pending motions. As we noted in our September 3, 2013 order dismissing, the circuit court's order provides, in pertinent part, as follows:

> Kentucky recognizes a three[-]prong test of bad faith. Those three prongs are:
>
> > (1) The insurer must be obligated to pay the claim under the terms of the policy;
> >
> > (2) The insurer must lack a reasonable basis in law or fact for denying the claim; and
> >
> > (3) It must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for such a basis existed . . . *Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993).

> The [appellees'] motion for partial summary judgment as to the first prong of this three[-]prong test is SUSTAINED.

(Order, January 11, 2011). Consequently, the cross-motions of Greenwich and Bituminous were denied. Appellants moved the circuit court to amend the order to add finality language pursuant to CR 54.02. On March 11, 2011, the circuit court entered a new order reiterating the January 11, 2011 order's rulings regarding the appellants' motions for summary judgment and the appellees' motion for partial summary judgment, and adding "[t]hat the Order is final and appealable, there being no just cause for delay."

The appellants filed timely notices of appeal and subsequently filed timely prehearing statements in accordance with CR 76.03(3). Greenwich's and Bituminous's separate prehearing statements identically state the appellees' claims against them as "alleging violations of the Kentucky Unfair Claims Settlement Practices Act ('UCSPA') and common law bad faith." The prehearing statements do not characterize the Fourth Amended Complaint as a declaration of rights action or otherwise refer to KRS 418.040 or a declaration of rights claim.

On May 12, 2011, appellees filed a motion in this Court to dismiss both appeals as interlocutory. The appellants filed responses.

Greenwich focused on the putative finality of the order from which the appellants were taking their appeal, arguing that it was final because, "[a]ccording to the Supreme Court in *Watson* [*v. Best Financial Services, Inc*., 245 S.W.3d 722

(Ky. 2008)], an order is final if it 'conclusively determines the rights of the parties in regard to that particular phase of the proceeding.'" (Greenwich Response to Motion to Dismiss Appeal). Again citing *Watson*, Greenwich further argued that if the appellees believed the circuit court's certification of its order as final was an abuse of discretion, it was incumbent upon them to file a cross-appeal to raise that issue in this Court and, having failed to do so, they waived the right to challenge it by motion to dismiss. Greenwich made no reference to the circuit court's order as having adjudicated a claim for declaration of rights.

Bituminous's response differed from that of Greenwich. Bituminous asserted, for the first time in this entire record, that the appeal was taken from the circuit court's determination of a declaration of rights claim. However, Bituminous did not argue that the Fourth Amended Supplemental Complaint presented such a claim. And, of course, Bituminous could not assert it had presented a declaration of rights claim in a counterclaim or cross-claim or third-party claim to that effect because neither Bituminous nor Greenwich had ever filed a responsive pleading. Rather, Bituminous argued that the appellants' "cross-motions for summary judgment sought a declaration of rights" based on the insurance contracts. Citing *Preferred Risk Mut. Ins. Co. v. Kentucky Farm Bureau Mut. Ins. Co*., 872 S.W.2d 469 (Ky. 1994), Bituminous argued that the Court of Appeals had jurisdiction because "the Supreme Court has approved of making such a declaration final and appealable."

On November 16, 2011, without the benefit of the record,[7] the Court of Appeals' November 2011 motion panel entered an interlocutory order denying the motion to dismiss. Thereafter, the case was briefed and eventually assigned to this separate panel of the Court to address the merits.

On September 3, 2013, this Court dismissed the appeal as having been taken from an interlocutory order. The panel was not unanimous and Judge Thompson authored a dissenting opinion.

Bituminous and Greenwich now present us with several reasons why we should reconsider the September 3, 2013 order, and then determine that the circuit court's order from which they take their appeals is not interlocutory, but final and appealable, and that their timely appeals properly conferred this Court with jurisdiction to hear them.

Greenwich's motion stated its concern that this merits panel of the Court "may be unaware that the Appellees did file a motion to dismiss due to the alleged interlocutory nature of the trial order and resultant lack of jurisdiction [and that] a unanimous motion panel . . . entered an order on November 16, 2011, denying the motion[.]" Similarly, Bituminous states it "seeks reconsideration principally because a prior panel of this Court following briefing by all parties, already considered the precise issue addressed" by this panel in the September 3, 2013 order. In a related argument, Bituminous urges *en banc* review because "two

[7] In accordance with the rules, the record in this case was not certified until December 21, 2011, and not delivered to this Court until May 24, 2012.

distinct panels of this Court have provided diametrically opposed opinions about whether the circuit court's order was final and appealable."

Both believe the case of *Preferred Risk* controls and justifies our exercise of appellate jurisdiction.

Both also argue that the circuit court did not abuse its discretion by certifying its order as final and appealable in accordance with CR 54.02. Greenwich argues that, under *Watson*, if the appellees believed the trial court abused its discretion in certifying the order pursuant to CR 54.02(1), they should have filed a cross-appeal, and that their failure to do so constituted a waiver of the right to object on that ground. *See Watson*, 245 S.W.3d at 727. Finally, the appellants ask us to consider the delay and expense that has already burdened the parties in this case.

We will address all of the appellants' arguments, including those first asserted in their successful responses to the appellees' motion to dismiss, in a sequence intended to provide greater understanding of the rules of finality and appellate jurisdiction, as well as of the operation of this Court.

1. This Court's November 16, 2011 Order Was An Interlocutory Order And Did Not Bind The Merits Panel In Any Way.

Appellate courts, like any other court, issue interlocutory orders that are subject to revisiting at any time. "[T]here is neither reason nor authority for treating decisions on [the Court of Appeals'] motion panel which make no final disposition of the case any differently than interlocutory orders in the trial court."

Knott v. Crown Colony Farm, Inc., 865 S.W.2d 326, 329 (Ky. 1993). "Such an order is by its nature subject to further review in the court where the case is still pending, either at the request of a party or *sua sponte*, until a final, appealable decision has been entered, whether by judgment, order or opinion." *Id.*

Therefore, we reject the argument that we are somehow bound by the prior interlocutory order of this Court.

2. Supreme Court Rule (SCR) 1.030(7)(d) Does Not Authorize En Banc *Consideration Of An Issue Addressed Differently By A Motion Panel and A Merits Panel In Same Case.*

We also reject the argument that, because of "inconsistency" between the decisions of the motion panel and merits panel, the Court of Appeals should consider this issue *en banc*. Supreme Court Rule (SCR) 1.030(7)(d) says, "If prior to the time the decision of a panel is announced it appears that the proposed decision is in conflict with the decision of another panel on the same question, the chief judge may reassign the case to the entire court." Unquestionably, the rule is intended to resolve conflicts in separate and distinct decisions proposed by different *merits* panels in different cases. The rule is inapplicable where a motion panel addresses an issue that the merits panel in the same case later revisits. Even our merits panel opinions are not final until the 31st day after they are rendered. If we accepted Bituminous's interpretation of the rule, the chief judge would have to consider assigning cases *en banc* with every grant of rehearing under CR 76.32 or reconsideration under CR 76.38(2).

To the extent Bituminous's motion is one for assignment of this case to the full Court, sitting *en banc*, it is denied.

3. It Is An Appellate Court's Constant And Continuous Duty To Assure It Has Jurisdiction To Address The Merits Of Any Appeal.

When this Court's motion panel addressed the appellees' motion to dismiss, there was no record for this Court to examine. The judges and staff attorneys who assisted them had only the motions and attachments to rely upon. When the case was assigned to this merits panel, the full record was available to the Court. That record, including the order from which the appeal was taken and the pleadings which indicated no claim, counterclaim, cross-claim, or third-party claim for declaratory relief, demonstrated that the order was interlocutory because it explicitly addressed only "one prong of a three-prong test" of liability on a single claim in the appellees' complaint. "While the parties did not raise the issue of appellate jurisdiction in their briefs, we are the guardians of our jurisdiction and thus are *obligated* to raise a jurisdictional issue *sua sponte* if the underlying order appears to lack finality." *Padgett v. Steinbrecher*, 355 S.W.3d 457, 459-60 (Ky. App. 2011) (emphasis added) (citations omitted). We emphasize that, "[i]n fact, we are *required* to do so." *Francis v. Crounse Corp.*, 98 S.W.3d 62, 64 (Ky. App. 2002) (emphasis added) (citing *Central Adjustment Bureau, Inc. v. Ingram Associates, Inc.*, 622 S.W.2d 681, 683 (Ky. App. 1981)).

This Court, and specifically this merits panel, adhered to its duty to determine its jurisdiction before proceeding to the merits of this case. Whether we

are correct in determining that we lack jurisdiction is an appealable decision that the Supreme Court may address.

We now turn to the reasoning behind our conclusion that we lack appellate jurisdiction.

4. Kentucky Appellate Jurisdiction is Limited To Final Judgments And Interlocutory Judgments and Orders As Authorized By The Supreme Court.

Generally, every trial court ruling falls into one of only two major classifications: a ruling either is final or interlocutory. While this has always been so, the line between these classifications has shifted, gradually at first, and then markedly with the adoption of the modern rules of civil procedure. For this Court to have jurisdiction, the order from which the appeal has been taken must either be a final judgment, or an interlocutory order identified by our Supreme Court as one from which an appeal may be taken. KRS 22A.020(2)(Court of Appeals "has jurisdiction to review interlocutory orders of the Circuit Court in civil cases, but only as authorized by rules promulgated by the Supreme Court."); *see also* KRS 21.060 (predecessor statute to KRS 22A.020 containing analogous language for civil appeals).

A. Traditional Final Judgment And Appellate Jurisdiction

Traditionally, there was only one kind of "final" ruling and that was the "final judgment." Before modern rules of civil procedure, there was but one "final judgment" in any case. *Black's Law Dictionary* defines a "final judgment" as the

"last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs" and notes that under "the final-judgment rule"[8] "a party may appeal only from a . . . final decision that ends the litigation on the merits." *Black's Law Dictionary* 705, 919 (9th ed. 2009).[9] Even today, *absent trial court intervention*, there is only one "final judgment" in a case.

In those bygone days before modern procedural rules, appellate jurisdiction was very narrowly defined; appeals could be brought *only* from these "final judgments."[10] All other orders of the trial court, including even rulings that

[8] *See Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511-12, 511 n.3, 70 S.Ct. 322, 324 n.3 (1950) (for a history of the final judgment rule and the attempts of drafters of modern civil procedure rules "to reduce as far as possible the uncertainty and the hazard assumed by a litigant who either does or does not appeal from a judgment"); *Preferred Risk*, 872 S.W.2d at 471 (Lambert, J., dissenting).

[9] Older Kentucky cases described a final judgment as "one where the last say has been said, [for if it] does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final." *Jacoby v. Carrollton Federal Sav. & Loan Ass'n*, 246 S.W.2d 1000, 1001 (Ky. 1952) (interpreting Civil Code of Practice § 368; internal quotation marks and citations omitted). A final judgment "leaves nothing to be done except to enforce by execution what has been determined." *Payton v. Payton*, 293 S.W.2d 883, 884 (Ky. 1956) (citations omitted) (interpreting Civil Code of Practice § 368). In those days before the modern rules of civil procedure, appellate jurisdiction was more strictly limited to these final judgments. *See*, *e.g.*, *Green River Fuel Co. v. Sutton*, 260 Ky. 288, 84 S.W.2d 79, 81 (1935) (when "several issues of law and of facts are presented for the consideration of the court in the same suit or proceeding . . . there can be no judgment from which an appeal can be taken while it remains necessary for the court to determine some issue of law or fact") (citation omitted); *Tipton v. Harris*, 26 Ky.L.Rptr. 909, 82 S.W. 585 (1904) ("This court only has jurisdiction to review any final judgment[, that is, a judgment] which puts an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy for which he sues.").

[10] See footnote 9, *supra*.

resolved the entirety of one or more, but less than all claims,[11] could not be appealed.[12]

B. A Second Kind Of Final Judgment

Today, the trial court can intervene to create a second kind of "final judgment." Unlike the traditional final judgment that was never anything but a

[11] Even non-final judgments that resolved the entirety of one claim could not be appealed. *Sutton*, 84 S.W.2d at 81 ("a judgment, to be final, must not merely decide that one of the parties is entitled to relief of a final character . . . .").

[12] There were exceptions, of course, but they were rare owing to the courts' concerns about "the possible procedural chaos and confusion that could result at the trial court level if such interlocutory orders were generally subject to attack . . . ." *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961). Such appeals were extraordinary and governed by inconsistent rules that slowly evolved to accommodate the "liberalization of our practice to allow more issues and parties to be joined in one action[.]" *Dickinson*, 338 U.S. at 511. As noted *infra*, modern civil procedure concepts, embraced by federal courts and quickly adopted by state jurisdictions, led the nation's courts away from the rigidity of the final judgment rule. In 1950, soon after the Supreme Court of the United States adopted the Federal Rules of Civil Procedure, it commented on the equivocal and uncertain prior state of jurisprudence in the area of finality determinations, and how adoption of the modern rules of procedure was intended to provide a cure. The Court said:

> Half a century ago this Court lamented, 'Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. . . . The cases, it must be conceded, are not altogether harmonious.' This lamentation is equally fitting to describe the intervening struggle of the courts; sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations; sometimes choosing one and sometimes another of the considerations that always compete in the question of appealability, the most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.
>
> The liberalization of our practice to allow more issues and parties to be joined in one action and to expand the privilege of intervention by those not originally parties has increased the danger of hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties before a final judgment can be had. In recognition of this difficulty, . . . Rule 54(b), Federal Rules of Civil Procedure, 28 U.S.C.A., was promulgated. . . .
>
> The obvious purpose of this section, as indicated by the notes of the advisory committee, is to reduce as far as possible the uncertainty and the hazard assumed by a litigant who either does or does not appeal from a judgment . . . . It provides an opportunity for litigants to obtain from the [trial c]ourt a clear statement of what that court is intending with reference to finality, and if such a direction is denied, the litigant can at least protect himself accordingly.

Dickinson, 338 U.S. at 511-12 (citations and footnotes omitted).

final judgment, this second kind of final judgment, necessarily, has its start as an interlocutory order. So, what is an interlocutory order? Consistent with our understanding of the traditional "final judgment," we have this definition of an interlocutory order from CR 54.02(1):

> [A]ny order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less 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 interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

CR 54.02(1).[13] As we noted, all "final judgments" in this second category of final judgments created by the civil rules begin as interlocutory orders. But not all interlocutory orders are capable of being made final judgments by the civil rules. To be capable of conversion to this second category of final judgments, the interlocutory order must first qualify as a "judgment." So, what is a judgment?

CR 54.01 defines "judgment" as "a written order of a court adjudicating a claim or claims in an action or proceeding." To be a "judgment" then, the trial court's ruling must adjudicate the entirety of at least one claim by resolving all elements of a claim in favor of the party asserting it, or by resolving at least one element of a claim in favor of the party opposing it. If, however, the judgment does not resolve *all* the claims involving *all* the parties, it is still not a

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[13] This is consistent with *Black's* definition of "interlocutory" as "not constituting a final resolution of the whole controversy." *Id.* at 889. *Black's* further defines an "interlocutory appeal" as "[a]n appeal that occurs before the trial court's final ruling on the *entire case*." *Id.* at 112 (emphasis added).

"final judgment," but remains a mere "interlocutory" judgment. The fact is, however, and it has always been so, that no interlocutory judgment (or interlocutory order for that matter) will remain interlocutory forever. It will become final, one way (CR 54.02(2)) or, under modern practice, another (CR 54.02(1)).

The first way an interlocutory judgment (or any order) will become final is the same way every single ruling in an action becomes final and appealable – under CR 54.02(2). This rule reflects the traditional way (and prior to modern civil rules generally the only way) interlocutory judgments and orders became final. It says:

> When the remaining claim or claims in a multiple claim action are disposed of by judgment[, *i.e.*, by the traditional final judgment], that [final] judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

CR 54.02(2). When an interlocutory judgment or order becomes final in this way, it need not recite that it is final and appealable; the bench and the bar should recognize that it is so by its very nature.[14]

[14] A judgment that resolves all the issues before the trial court, even though it "does not include the magic words of CR 54.02 'there is no reason for delay,' or 'this is a final order,' is still a final and appealable order." *Security Federal Sav. & Loan Ass'n of Mayfield v. Nesler*, 697 S.W.2d 136, 138 (Ky. 1985). "The magic words required by CR 54.02 for finality do not apply because the result of the . . . order left nothing to adjudicate regarding the rights and priorities of the parties." *Id.* at 138-39. Appeals, such as *Nesler*, have been lost because the attorney presumed that, absent this "finality" language, the judgment was not final.

The second way an interlocutory judgment may become final did not exist prior to the modern rules of civil procedure – specifically in Kentucky, by the adoption of CR 54.02(1). That rule says:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less 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 interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

CR 54.02(1). Provided the order qualifies for treatment under the rule, the trial court has discretion to utilize this subsection, or to choose not to do so.[15] However, we never reach the issue of the trial court's discretion unless we first consider whether the order which is appealed qualifies for CR 54.02(1) treatment.

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[15] The Supreme Court has cautioned circuit courts that they should not reflexively grant motions to convert interlocutory judgments into final judgments. The rule requires more of the circuit court than the mere acquiescence to attorneys' request for recitation of CR 54 .02(1) language in the order. *Watson*, 245 S.W.3d at 727 ("A trial court should not grant CR 54.02 requests routinely or as a courtesy to counsel."). It requires a determination that there truly is no just reason for delay.

> That determination should be sensitive to the general rule disallowing piecemeal appeals, but the trial court is granted discretion in applying the rule. Where the judgment truly disposes of a distinct and separable aspect of the litigation, the trial court's determination that there is no just reason for delay will only be disturbed if that discretion was abused.

Shawnee Telecom Resources, Inc. v. Brown, 354 S.W.3d 542, 549 (Ky. 2011).

Broken down, CR 54.02(1) has two prefatory requirements before we get to the trial court's exercise of discretion. First, the action before the trial court must involve "more than one claim" (which the rule itself defines as a "claim, counterclaim, cross-claim, or third-party claim") brought against one or more parties, or, if the action involves only one claim, that claim must be brought against "multiple parties[.]" Next, the ruling entered by the trial court must qualify as a judgment in that it fully adjudicates the entirety of at least one claim against at least one defendant. These requirements of the rule do not involve the trial court's discretion. If these requirements are not met, CR 54.02(1) is irrelevant.

We pause here to note that there is no question that the order from which the appeal is taken is not a final judgment in the traditional sense, *i.e.*, it does not resolve *all* claims against *all* parties. If that were not so, there would have been no need for the appellants to seek amendment of the order to include language from CR 54.02(1). The order includes that language. Therefore, to be a final and appealable judgment under this rule, the order must satisfy the two prefatory requirements of (1) multiple claims or multiple parties and (2) that the order fully adjudicate at least one claim between the appellees and each of the appellants. When we apply these two requirements to the order from which these appeals are taken, we see that the first is met, but the second is not.

As already noted there were multiple claims in this case, not all of which are as yet fully adjudicated; so, the first requirement is satisfied. So why is the second requirement – that the judgment fully adjudicates the entirety of at least one claim

against at least one defendant – not satisfied here? The answer is that a "*claim*" for declaration of rights was never asserted in this case. We know this by considering *Preferred Risk*, the case both Greenwich and Bituminous cite, in the context of the applicable statute, KRS 418.040, and the various civil rules.

To begin, the appellants misread *Preferred Risk*. The Court in *Preferred Risk* said, "The trial court, having made the *requested declaration of rights*, was certainly empowered to denominate this portion of its adjudication as final and appealable . . . ." *Preferred Risk*, 872 S.W.3d at 470 (emphasis added). Significantly, how the declaration of rights is requested makes all the difference.

Let us recall that the record in the circuit court does not reveal that appellants were pursuing a declaration of rights claim. That notion first appeared in this Court, in the response of Bituminous to appellees' motion to dismiss the appeal. Appellants told this Court that they pursued a declaration of rights by filing a "cross-motion for summary judgment." But that is not what the insurance company did in *Preferred Risk*. "Preferred Risk included a *claim* for declaratory relief . . . ." *Id.* (emphasis added). In the case before us, neither Greenwich nor Bituminous asserted "a *claim* for declaratory relief." We know this by reading KRS 418.040 and our Rules of Civil Procedure in the context of the record and the appellants' own words that their "cross-motions for summary judgment sought a declaration of rights."

The statute creating the claim for declaratory relief states that,

> In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

KRS 418.040.[16] When we read the word "plaintiff" in this statute, we do not presume the legislature meant to exclude other parties who may bring claims, such as a defendant asserting a counterclaim against the plaintiff, or a defendant asserting a cross-claim against another defendant, or a party asserting a third-party complaint. To the contrary, considering the language of our Rules of Civil Procedure, we believe the legislature intended to include a claim for a declaration of rights, "whether [brought as] an original claim, counterclaim, cross-claim, or third-party claim . . . ." CR 8.01; *see also* CR 7.01 (defining pleadings); CR 12.02 (asserting defenses to "claims" as defined in CR 8.01); CR 14.01; CR 18.01; CR 41.03; CR 42.02; CR 54.02(1); CR 55.03.

We give particular attention to CR 54.02(1), the source of the "magic words" that makes interlocutory judgments final and appealable. That rule says that when multiple claims are brought in a single action, "whether as a claim,

[16] We note that this statute creates a claim not recognized at common law. We also note that a declaration of rights claim itself stands alone as a complete and independent claim; this is why the statute states that it may be brought "either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked." KRS 418.040. But for this language, a ruling on a declaratory relief claim that left a related demand for damages, or other "consequential relief" dependent thereon, would not be a judgment as defined by CR 54.02(1) and, could not be made final and appealable even with the use of the "magic words" from CR 54.02(1). *Tax Ease Lien Investments 1, LLC v. Brown*, 340 S.W.3d 99, 102 (Ky. App. 2011) (quoting *Chittum v. Abell*, 485 S.W.2d 231, 237 (Ky. 1972) ("judgment to the extent it adjudged [defendants] liable to [plaintiffs], reserving the determination of damages for a later trial, was not a final judgment, notwithstanding the trial court's CR 54.02 recitations, because it did not fully adjudicate the damage claim")).

counterclaim, cross-claim, or third-party claim," the trial court may use finality language to make the otherwise interlocutory judgment final and appealable. Neither Greenwich nor Bituminous asserted a claim for declaration of rights as a claim, counterclaim, cross-claim or third-party claim; they filed "cross-motions for summary judgment[.]" Nowhere in the civil rules or declaration of rights statute, or elsewhere, is a motion or cross-motion treated as a claim. *See Littlefield v. Commonwealth*, 554 S.W.2d 872, 874 (Ky. App. 1977) ("motion for relief was not 'an action, or any claim therein' within the meaning of CR 41.01(1), as clarified in Civil Rules 7.01 and 7.02 distinguishing between pleadings and motions.").

Because the appellants' pursuit of a declaration of rights was not brought as a "claim" as defined by CR 8.01, the appellees were deprived of the opportunity to respond under CR 8.02. *Cabbage Patch Settlement House v. Wheatly*, 987 S.W.2d 784, 786 (Ky. 1999) (citing *Lee v. Stamper*, 300 S.W.2d 251, 253 (Ky. 1957)("The principal objective of a pleading is to give the opposing party fair notice of the essential nature of the claim presented and the type of relief to which the claimant deems himself entitled.")).

The order denying the appellants' respective cross-motions for summary judgment could not be a judgment because it did not resolve even one claim in its entirety. The only claim to which the cross-motion related was, as the circuit court said, "the first prong of this three[-]prong test" of the liability phase only of but one of the appellees' claims.

Because the appellants could not satisfy the second requirement of CR 54.02(1) – that the order or judgment resolve at least one entire claim – the order did not qualify as a judgment, the circuit court lacked the discretion to apply the rule, and, therefore, to the extent the rule can make interlocutory judgments final, it is inapplicable here. As our Supreme Court has said, "[I]t is the character of the order that controls. . . . This order was truly interlocutory and nonappealable." *Sublett v. Hall*, 589 S.W.2d 888, 891 (Ky. 1979) (citing *Hale v. Deaton*, 528 S.W.2d 719 (Ky. 1975)).

Because the order from which the appeal is taken does not fit in either category of "final judgments," this Court does not have appellate jurisdiction on that basis. However, the Supreme Court has identified certain orders as being among the few this Court is authorized to review, despite their immutably interlocutory nature. Unfortunately for the appellants, the order from which they take their appeal is not among them.

C. Appealable Interlocutory Orders

Since adoption of the current Kentucky Rules of Civil Procedure, and even before, this Court "has [had] jurisdiction to review interlocutory orders of the Circuit Court in civil cases, but only as authorized by rules promulgated by the Supreme Court." KRS 22A.020(2); *see also* KRS 21.060 (predecessor statute to KRS 22A.020 containing analogous language for civil appeals). Our Supreme Court "construe[s] KRS 22A.020(2) to encompass both the Kentucky Rules of Civil Procedure and the 'rules' or rulings of the Supreme Court of Kentucky

announced in published decisions." *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 n.1 (Ky. 2009).

The Supreme Court's "rules" authorizing appellate jurisdiction of interlocutory orders and judgments originate in statutes, rules of civil procedure, rules of criminal procedure, and opinions rendered by our Supreme Court. No interlocutory order that fails to squarely fit one of these rules may be appealed.

In *Prater*, our Supreme Court identified several of these kinds of orders.

> CR 65.07[17] permits an interlocutory appeal from an order "grant[ing], den[ying], modif[ying], or dissolv[ing] a temporary injunction[.]" KRS 22A.020(4) permits the Commonwealth an interlocutory appeal under certain circumstances in criminal cases. KRS 417.220 permits an interlocutory appeal from "[a]n order denying an application to compel arbitration. . . ." And in *Asset Acceptance LLC v. Moberly*, 241 S.W.3d 329, 334–35 (2007), we held
>
> > an order setting aside a judgment more than a year old pursuant to the "reason [of] an

[17] CR 65.07 is captioned "Interlocutory relief in Court of Appeals prior to final judgment." This rule actually instructs parties and the Court of Appeals how to proceed with this rather special, usually expedited, appeal. It well could be argued that the real source of authority for this type of "interlocutory" appeal is not CR 65.07, but CR 54.02 itself. Section (3) of CR 54.02 states: "For the purposes of this rule demands in an action for both injunctive relief and damages may be treated as *separate claims*." (emphasis added). Therefore, a circuit court's decision as to a claim for injunctive relief may be appealed, even if damages have not been determined, because the Supreme Court has denominated the claim for injunctive relief alone a "separate claim[.]" When that separate claim is resolved, it is an interlocutory judgment under CR 54.01 that can be made a final and appealable judgment of the second category described above, provided the circuit court includes finality language set out in CR 54.02(1). Treating the pursuit of a injunction alone as a separate claim certainly makes sense because, like some claims for declaratory relief under KRS 418.040, some injunctive relief actions do not seek damages; some injunction actions seek only the compulsion or cessation of the opposing party's conduct. Notably, this is nearly identical to the reasoning implied in *Preferred Risk* for that decision. The appeal of the adjudication of a claim for injunctive relief and the appeal of declaratory judgments are appropriately denominated "interlocutory," but both can be made final and appealable judgments under CR 54.02(1). CR 65.07, however, authorizes the appeal even when the interlocutory ruling on the injunctive relief does not include finality language from CR 54.02(1).

> extraordinary nature" provision of CR 60.02(f) is subject to immediate appellate review to ensure that CR 60.02(f) has not been invoked to, in effect, evade the one-year limitations period CR 60.02 imposes on claims appropriately regarded as falling under CR 60.02(a), (b), or (c).

Prater, 292 S.W.3d at 886 (footnote omitted). *Prater* then recognized another kind of order for which an immediate appeal was available – "an order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Id.* at 887.[18]

Summarizing, the Supreme Court's rules have recognized that authority for interlocutory appeal can be found in an act of the legislature,[19] in the Kentucky Rules of Civil Procedure,[20] and by Supreme Court opinion.[21] The appellants have directed us to no Supreme Court rule that allows the interlocutory appeal of an order deciding "the first prong of this three[-]prong test" set forth in *Wittmer*, 864 S.W.2d at 890.

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[18] The reason the Supreme Court did not, in *Prater*, cite orders denying declaratory relief should be obvious. As noted in footnote 16, *supra*, the legislature was careful to make claims for declaratory relief separate and distinct claims, even when brought with other claims for relief. A ruling upon such a claim is an interlocutory *judgment* because KRS 418.040 says so, and it can be made final and appealable, should the trial court so decide within its discretion, pursuant to CR 54.02(1).

[19] *E.g.*, KRS 417.220(1)(a): "An appeal may be taken from . . . [a]n order denying an application to compel arbitration." Therefore, "[t]he interlocutory nature of [such] an order . . . does not deprive us of jurisdiction." *Kindred Nursing Centers Ltd. Partnership v. Leffew*, 398 S.W.3d 463, 466 n.4 (Ky. App. 2013) (citing *Padgett v. Steinbrecher*, 355 S.W.3d 457, 460 (Ky. App. 2011) (citations omitted)).

[20] *E.g.*, CR 65.07.

[21] *E.g., Prater*, 292 S.W.3d at 886.

We acknowledge the functional similarity of the first prong of the *Wittmer* test and a claim that appellants could have brought pursuant to KRS 418.040. But that is not enough. While there is no case directly on point here, there is a remarkably analogous decision we will quote. The case is *First Nat. Bank of Mayfield v. Gardner*, 330 S.W.2d 409 (Ky. 1959). It is a will contest involving the validity of a release of estate property. Our highest court said this, much of which could apply by near perfect analogy to the circumstances of our case:

> The order holding the release to be invalid did nothing more than dispose of a defense, and therefore was purely interlocutory. *Payton v. Payton*, Ky., 293 S.W.2d 883. Although *a separate action could have been brought* by Bunk Gardner, Sr., in the first instance, to set aside the release, and such action would have presented a '*claim* for relief,' we think the issue injected in the instant action with respect to the validity of the release, by virtue of the defendants' pleading the release as a defense, was merely collateral to the main issue of the validity of the will, and therefore did not amount to a separate claim for relief.

First Nat. Bank of Mayfield v. Gardner, 330 S.W.2d at 411 (emphasis added). The appellants here could have brought a declaration of rights claim in the nature of a counterclaim, but they did not. Instead, they asserted non-coverage as a defense to the appellees' complaint. Like the order holding the release invalid in *Gardner*, the order finding for the appellees in the case before us "was purely interlocutory [and], by virtue of the defendants' pleading [no coverage] as a defense, was merely collateral to the main issue" of whether the appellants had engaged in bad faith.

5. The Remaining Arguments And Issues Are Meritless.

The appellants' remaining claims and assertions are without merit.

A. Appellants' Argument That Appellees Waived The Right To Challenge The Trial Court's Exercise Of Discretion Under CR 54.02(1) Is Moot.

If this case hinged on the trial court's discretion in making the order in this case final under CR 54.02(1), the appellants' argument that appellees waived the right to claim abuse of that discretion would have merit. *Watson*, 245 S.W.3d at 727. However, it does not. The applicable rule plainly does not authorize certification of orders that are not judgments as defined by CR 54.01 – "a written order of a court adjudicating a claim or claims in an action or proceeding." We did not conclude that we lack jurisdiction because the trial court abused its discretion; we determined that the order entered by the trial court did not adjudicate the entirety of any claim. The trial court's discretion is not in issue because the interlocutory order could not be made final even with the "magic words" of CR 54.02(1); therefore, the order adjudicating less than one entire claim was beyond the trial court's discretion to make final. The trial court's discretion was irrelevant, and this argument necessarily fails as our holding makes it moot.

B. Increased Cost And Inconvenience Is Not A Consideration That Will Affect Our Exercise Of Jurisdiction.

We recognize that this case is a lingering one. However, "[t]hat a party will be exposed to the inconvenience and cost of litigation does not alone justify immediate review of an otherwise nonfinal order." *Fayette County Farm Bureau Federation v. Martin*, 758 S.W.2d 713, 714 (Ky. App. 1988) (citing *National*

Gypsum Co. v. Corns, 736 S.W.2d 325 (Ky. 1987)). The reason we cannot proceed with a review is that the appellants never brought a claim for a declaration of rights under their contract of insurance, and because, absent a Supreme Court rule authorizing it, we have no jurisdiction to review interlocutory appeals of less than all of at least one claim against at least one party. We cannot ignore the law governing our jurisdiction because of cost or delay attributable, at least in part, to the parties asking us to do so.

6. Conclusion.

For the foregoing reasons, we hold that we lack jurisdiction to review the appeal, we decline to consider the appeal *en banc*, and we dismiss the appeal as having been brought from an interlocutory order.

MOORE, JUDGE, CONCURS.

ENTERED: February 21, 2014

CHIEF JUDGE, COURT OF APPEALS

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. After careful review of the briefs and exhibits, the dismissal of these appeals for want of jurisdiction is unwarranted. I disagree that the circuit court's order does not resolve at least one claim which should proceed on its merits.

This litigation was filed by the heirs of the Estate of Lahoma Saylor Bramble (heirs) alleging several claims based upon the drilling and removal of natural gas from property belonging to the heirs. Heirs filed several complaints. As a portion of the relief requested, heirs requested a declaration of rights under the first amended complaint, second amended complaint and third amended complaint.

On March 12, 2008, the circuit court entered a partial summary judgment against J.D. Carty Resources, LLC (JDCR), Anaconda Drilling of Kentucky, LLC (Anaconda), and Country Gas determining that they were liable for trespass to

minerals, but ruled that a jury trial would determine the amount of damages and apportion fault.

On December 17, 2008, an order and judgment were entered pursuant to a settlement agreement. The order required JDCR and Country Gas to pay $628,000 in settlement of all claims and entered a judgment in that amount. Execution of the judgment was postponed and the action was stayed against all of the parties (including Anaconda) in lieu of $90,000 to be paid on or before December 18, 2008, with the balance to be paid in ten equal installments. Failure to comply with these payment provisions would cause the stay to be lifted and allow the heirs to choose whether to ask the court for a hearing to enforce settlement, proceed with execution of the judgment, or file a motion requesting the court to set the damages issues for trial.

JDCR was insured by Greenwich Insurance Company (Greenwich) and Anaconda was insured by Bituminous Casualty Company (Bituminous). Both insurance companies reached an agreement with their insured that they would each pay $20,000 to the heirs as a portion of the first required settlement payment in exchange for the policyholders' release and indemnification for any liability they might have for the trespass. Heirs received these funds but it is unclear how much of the settlement agreement was satisfied beyond the $40,000 payment.

Heirs expected the insurance companies to pay under their policies, but the insurance companies refused, asserting that the claims were not covered and that they had been released by the insured and by heirs when they deposited their

checks. Thereafter, heirs filed their fourth amended complaint naming Greenwich and Bituminous alleging their policies covered JDCR's and Anaconda's actions for which liability had been established and asserting claims that Greenwich violated the Unfair Settlement Practices Act. The complaint further alleged that both insurance companies violated common law by acting with bad faith and heirs were entitled to recover from the insurance companies their damages with interest, punitive damages, attorney's fees and costs. The fourth amended complaint incorporated all previous claims in the prior complaints, including the request for declaration of rights.

Heirs then moved for partial summary judgment to declare that Greenwich and Bituminous were obligated to pay their claims against JDCR and Anaconda under the terms of their insurance policies. The insurance companies filed cross-motions for summary judgment to establish no liability and with Greenwich seeking dismissal of heirs' claims.

On January 11, 2011, the circuit court entered an order denying the insurance companies' motions and sustained heirs' motion, finding that Bituminous's and Greenwich's insurance policies provided coverage for their insured, which formed the basis of the judgment rendered against the insured. It then determined, based on finding coverage, that the first prong of the bad faith claim that the insurer must be obligated to pay was satisfied.

On March 11, 2011, in response to multiple motions, the circuit court determined: "The motions are SUSTAINED as to the request to make the January

11, 2011, Order final and appealable. That Order is final and appealable, there being no just cause for delay."

Bituminous and Greenwich appealed. Oral argument was granted but later canceled on the Court's own motion. Neither party raised any issues, or requested a dismissal, nor argued whether this appeal was improper and vigorously argued their positions on the merits.

CR 54.02 states, "where the judgment truly disposes of a distinct and separable aspect of the litigation, the trial court's determination that there is no just reason for delay will only be disturbed if that discretion was abused." *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 549 (Ky. 2011).

A declaration of rights is distinct from other relief. KRS 418.040. A declaration of rights is not interlocutory just because other relief has been requested in the complaints.

Preferred Risk Mut. Ins. Co. v. Kentucky Farm Bureau Mut. Ins. Co., 872 S.W.2d 469 (Ky. 1994), provides useful guidance. Preferred Risk sought subrogation of the basic reparation benefits it paid and a declaration as to whether Farm Bureau's policy afforded liability for a collision. Preferred Risk moved for summary judgment on its claim for declaratory relief and the trial court granted the motion, finding liability under Farm Bureau's policy. When Farm Bureau appealed, Preferred Risk argued that a summary declaratory judgment was an interlocutory order because it sought not only declaratory relief but also specific monetary damages. However, the Supreme Court determined that:

> The trial court, having made the requested declaration of rights, was certainly empowered to denominate this portion of its adjudication as final and appealable, notwithstanding the possible necessity of further proceedings between these parties to assess damages, or of further proceedings between the remaining parties to the litigation.

Id. at 470.

Accordingly, in the case before us, there is no abuse of discretion by the trial court in making the requisite declaration of finality. While the parties may need to litigate the bad faith claims, the issue of liability is key to the remaining litigation. The case was becoming stale and continues to be stale, and it is reasonable not to want to delay resolution of these important peripheral matters. *Shawnee Telecom Res., Inc.*, 354 S.W.3d at 550. Additionally, depending on whether coverage exists, we can avoid the insurance companies having to defend the additional claims against them, which depend upon whether the policies can be applied. *Preferred Risk Mut. Ins. Co.*, 872 S.W.2d at 470.

Further, it is my belief that we should never dismiss an appeal without allowing parties to brief the issues. There has been no order for the parties to supplement their briefs on this issue. This appeal should be heard and, therefore, I dissent.

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