2017 IL App (1st) 161446-U

No. 1-16-1446

Third Division
November 8, 2017

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

VINCENT RODRIGUEZ, Plaintiff-Appellant and Cross-Appellee, v. PETER ULBRICHT, FORE TRANSPORTATION, INC., and GREY GHOST SERVICES,INC., Defendants-Appellees and Cross-Appellants.	))))))))))	Appeal from the Circuit Court of Cook County. No. 2012 L 001248 Honorable Diane M. Shelley, Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Appeal and cross-appeal from trial court's order for new trial and denial of motion for judgment notwithstanding the verdict were not final orders. The appellate court lacked jurisdiction to consider an interlocutory appeal where parties failed to file a petition for leave to appeal pursuant to Illinois Supreme Court Rule 306 (eff. Mar. 8, 2016).

¶ 2 Plaintiff Vincent Rodriguez appeals from the trial court's order granting a new trial after it found that the jury had returned a legally inconsistent verdict. Defendants Peter Ulbricht, Fore Transportation, Inc. (Fore Transportation), and Grey Ghost Services, Inc.

(Grey Ghost) have filed a cross-appeal challenging the trial court's denial of their motion for judgment notwithstanding the verdict. We dismiss the appeal for lack of jurisdiction.

¶ 3 BACKGROUND

¶ 4 On January 24, 2012, Ulbricht was driving towards an intersection in a tractor trailer truck owned by Grey Ghost, a corporation solely owned by Ulbricht. He was working as the agent of Fore Transportation. At the same time, plaintiff left his nearby high school to walk home. As he entered the crosswalk, Ulbricht was turning right. Plaintiff came into contact with the truck's trailer and was ultimately struck by the vehicle's rear wheels. He was severely injured.

¶ 5 Plaintiff filed a complaint against defendants on February 2, 2012, and later filed an amended complaint on January 11, 2016. The amended complaint alleged that Ulbricht had negligently operated his truck and caused plaintiff's injuries. It further alleged that Ulbricht was acting as the employee and agent of Fore Transportation and Grey Ghost at the time of the accident. In their answers to the amended complaint, defendants admitted that Ulbricht was acting as an agent of Fore Transportation at the time of the accident, but denied that he was an agent of Grey Ghost.

¶ 6 At the commencement of the trial, the court read several instructions to the jury. It included an instruction, proffered by defendants and agreed to by plaintiff, that was substantially similar to Illinois Pattern Jury Instruction, Civil, No. B21.02.01 (hereinafter IPI Civil, No. B21.02.01) (2016), although it substituted the parties' names for "plaintiff" and "defendant." It stated that plaintiff bore the burden of proof regarding the elements of negligence and "You are to consider these propositions as to each, Fore, Peter Ulbricht, and Grey Ghost, separately."

¶ 7 After the close of evidence, the trial court again instructed the jury on plaintiff's burden, but did not include the language instructing the jury to consider defendants separately. During the discussion of the jury instructions, the parties agreed that I.P.I. Civil, No. 50.01 would be given to the jury. The proposed instruction indicated that Fore Transportation was a principal and Ulbricht was its agent and that if the jury found Ulbricht liable they must also find Fore Transportation liable, and if it found Ulbricht not liable, they must find the company not liable. However, for unknown reasons, the proposed instruction was not read to the jury. Neither party objected to its omission.

¶ 8 After the court instructed the jury, the parties discussed the verdict form with the court largely off the record. Following the discussion, the court explained that it had created a Verdict A form that asked the jury for its verdict against each defendant individually. The form also asked the jury to apportion "legal responsibility" for the accident between plaintiff and Ulbricht. When plaintiff's counsel expressed concern about the possibility of an inconsistent verdict, the court stated that it could rectify such a situation so there was no inconsistency. Both parties then agreed to the verdict form.

¶ 9 The jury returned a verdict for plaintiff against Fore Transportation and Grey Ghost for $1,748, 890, but found for Ulbricht against plaintiff. The jury further found that plaintiff was 49% legally responsible for his injuries and Ulbricht was 51% legally responsible. Two special interrogatories were returned, in which the jury found that plaintiff was contributorily negligent, but not more than 50% of the total proximate cause. The jury was not polled.

¶ 10 Defendants filed a post-trial motion which argued, *inter alia*, for a judgment notwithstanding the verdict because the verdicts were legally inconsistent under *respondeat superior* principles. They argued alternatively that a new trial was warranted because the

jury's verdict for Ulbricht was legally inconsistent where it also found that he was 51% legally responsible. The trial court found that the verdict was legally inconsistent and entered an order granting defendants' motion for new trial on May 13, 2016. Defendants filed a motion on June 6, 2016 seeking clarification of the order regarding their motion for judgment notwithstanding the verdict. The trial court filed a supplemental order on September 23, 2016, adopting the previous order and denying the motion for judgment notwithstanding the verdict.

¶ 11 Plaintiff filed an amended notice of appeal challenging the trial court's order granting a new trial on June 7, 2016. Defendants filed a notice of cross-appeal challenging the denial of its motion for judgment notwithstanding the verdict on July 25, 2016.

¶ 12 ANALYSIS

¶ 13 Plaintiff contends that the trial court erred in ordering a new trial because defendants waived any *respondeat superior* argument by failing to object to improper jury instructions and the verdict form which allowed for the inconsistency. They also contend that there was no inconsistency because the jury's specific finding of 51% legal responsibility for Ulbricht supersedes the general verdict for him. In their cross-appeal, defendants contend that the verdict finding Ulbricht, the agent, not liable and finding Fore Transportation and Grey Ghost, the principals, liable was legally inconsistent. They argue that the proper remedy was a granting of their request for a judgment notwithstanding the verdict and not a new trial.

¶ 14 Before addressing the merits of either claim, we must first determine whether this court has jurisdiction. Defendants argue that plaintiff has improperly attempted to bring his appeal under the procedures set forth in Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. Jan 1, 2015), which govern direct appeals as a matter of right. They assert that he

should have instead filed a petition for leave to appeal under Rule 306 (eff. Mar. 8, 2016), which governs interlocutory appeals. Plaintiff admits his error, but responds that defendants have made the same mistake.

¶ 15 Where the appellate court lacks jurisdiction, an appeal must be dismissed. *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 754 (2006). Our jurisdiction is limited to the review of final orders, unless the order appealed fits an exception established by supreme court rules. *Village of Sugar Grove v. Rich*, 347 Ill. App. 3d 689, 693 (2004). Rule 301 states, "Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional." Rule 303 sets forth the procedural requirements for filing a notice of appeal. Plaintiff admits that he does not appeal from a final order, and thus Rule 301 was inapplicable to his claims. We therefore consider whether defendants' cross-appeal constitutes an appeal of a final order.

¶ 16 Defendants assert, without legal citation, that "a denial for judgment notwithstanding the verdict specifically falls within the ambit of Rule 303." Defendants' proposition is incorrect. In determining whether an order is final, we look to the substance of the order and not merely its form or title. *Schal Bovis, Inc. v. Casualty Insurance Co.*, 314 Ill. App. 3d 562, 567 (1999). An order is final under Rule 301 "when it terminates the litigation between the parties on the merits or disposes of the rights of all the parties in regard to the entire controversy or some definite part thereof." *In re Petition to Incorporate Village of Greenwood*, 275 Ill. App. 3d 465, 470 (1995). Our analysis requires consideration of the context of the order's entry, including all pleadings, motions, and issues before the court. *Dewan v. Ford Motor Co.*, 343 Ill. App. 3d 1062, 1069 (2003).

¶ 17 Defendants characterize their cross-appeal as seeking solely to overturn the trial court's denial of their motion for judgment notwithstanding the verdict. However, that order was inextricably linked to the trial court's order granting a new trial. Defendants sought the judgment and a new trial in the same filing, the arguments for both raised similar issues regarding legal inconsistency, and neither motion could be granted without the denial of the other. Although defendants assert that they seek to overturn the denial of the motion for judgment notwithstanding the verdict, such a result cannot be achieved without also reversing the trial court's order granting a new trial. An attack on a order granting a new trial is explicitly governed by Rule 306(a)(1), not by Rules 301 and 303. Moreover, the order that denied defendant's motion for judgment notwithstanding the verdict did not "terminate[] the litigation between the parties on the merits or dispose[] of the rights of all the parties." See *In re Petition to Incorporate Village of Greenwood*, 275 Ill. App. 3d at 470. Due to the order for new trial, the litigation between the parties has not been terminated and the ultimate disposition of their rights has not yet been determined. As such, defendants are not seeking appeal from a final order and we do not have jurisdiction under Rule 301.

¶ 18 Plaintiff asks this court to accept both his appeal and defendants' cross-appeal under Rule 306. The rule states that "[a] party may petition for leave to appeal to the Appellate Court *** from an order of the circuit court granting a new trial." Ill. S. Ct. R. 306(a)(1). Rule 306 specifically requires a petition for leave to appeal to be filed within 30 days after entry of the contested order or within an extension of time granted by the reviewing court "in order to vest the appellate court with jurisdiction." *In re Leonard R.*, 351 Ill. App. 3d 172, 174 (2004) (citing *Kemner v. Monsanto Co.*, 112 Ill. 2d 223, 236 (1986)); see also, *Law Offices of Jeffery M. Leving, Ltd. v. Cotting*, 345 Ill. App. 3d 495, 499 (2003) (quoting *National Seal Co. v.*

Greenblatt, 321 Ill. App. 3d 306, 308, (2001)). The petition must include "a statement of the facts of the case, supported by reference to the supporting record, and of the grounds for the appeal." Ill. S. Ct. R. 306(c). Such a petition may be granted "if it presents grounds which are reasonably debatable, and fairly challenge the propriety of the order [citation] or if it clearly demonstrates that the circuit court abused its discretion by ordering the new trial [citation]." *Allied American Insurance Co. v. Culp*, 243 Ill. App. 3d 490, 492 (1993).

¶ 19 Supreme court rules are mandatory, "not mere suggestions." *In re County Treasurer*, 2015 IL App (1st) 133693, ¶ 19. Our supreme court has admonished that the "appellate and circuit courts of this state must enforce and abide by the rules of this court. The appellate court's power 'attaches only upon compliance with the rules governing appeals.' " (Emphasis and citations omitted.) *People v. Salem*, 2016 IL 118693, ¶ 19. Thus, we generally "do[] not have the authority to excuse" a party's failure to comply with filing requirements of the supreme court rules governing appeals. *Id*. Neither plaintiff nor defendants filed a petition for leave to appeal within 30 days of the challenged orders. Accordingly, we do not have jurisdiction under Rule 306.

¶ 20 Plaintiff cites *Allied American Insurance Co. v. Culp*, 243 Ill. App. 3d 490 (1993), for the proposition that we have discretion to accept his appeal and defendants' cross-appeal despite their failure to comply with Rule 306. In *Culp*, an accident victim appealed from a circuit court order vacating an arbitration order and remanding the case for a new arbitration. *Id.* at 491-92. Finding that such an order was not final but interlocutory, a panel of the appellate court found that it did not have jurisdiction pursuant to Rule 301. *Id.* at 492. The court determined, however, that the party's notice of appeal could be treated as a petition for leave to appeal under Rule 306 because he had "presented grounds which fairly challenge the

propriety of the order and clearly demonstrate that the circuit court abused its discretion." *Id.* We find *Culp* distinguishable. Plaintiff's notice of appeal did not present grounds challenging the propriety of the order nor did it clearly demonstrate an abuse of discretion. Instead, the notice of appeal was a standard form that set forth merely the order being appealed without identifying the grounds of plaintiff's challenge. As such, we cannot find that the notice of appeal was sufficient to serve as a petition under the requirements of Rule 306(c).

¶ 21 We note that *Culp* relied on *In re Custody of Purdy*, 112 Ill. 2d 1, 4 (1986). *Purdy* and its progeny have indicated that if an appellate court finds that its jurisdiction to review custody orders has not been properly invoked, it should " 'consider[ ] the propriety of the order under [what is now Rule 306(a)(5)] in order to resolve the custody question as quickly and economically as possible.' " *In re Marriage of Kostusik*, 361 Ill. App. 3d 103, 112 (2005) (quoting *Purdy*, 112 Ill. 2d at 4). Since *Purdy*, both the supreme and the appellate courts have recharacterized some custody appeals "as petitions for leave to appeal pursuant to Rule 306(a)(5) where the parties seeking review have relied on erroneous law or erroneous cases in failing to invoke Rule 306(a)(5)." *Id.* However, courts have not done so where the appellant did not rely on erroneous law or precedent in failing to cite Rule 306. See *In re Alicia Z.*, 336 Ill. App. 3d 476, 493-94 (2002). Here, the important concerns underlying custody determinations are not present and neither party has cited erroneous law or precedent on which they mistakenly relied in failing to file a petition pursuant to Rule 306. Accordingly, we find this line of cases inapposite.

¶ 22 Neither party has filed a petition seeking leave to appeal as required by Rule 306. We therefore lack jurisdiction to consider the trial court's non-final order and must dismiss.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, we dismiss this appeal for lack of jurisdiction.

¶ 25 Appeal dismissed.