

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1581

September Term, 2014

MURRAY A. KIVITZ, PERSONAL
REPRESENTATIVE OF THE
ESTATE OF SEYMOUR BADEN

v.

ERIE INSURANCE COMPANY, ET AL.

Arthur,
Friedman,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: September 4, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises out of a decision by the Circuit Court for Montgomery County denying a motion for summary judgment filed by Murray A. Kivitz, personal representative of the Estate of Seymour Baden, appellant, granting summary judgment in favor Erie Insurance Exchange, appellee, and entering a declaratory judgment regarding coverage under a policy of insurance issued by Erie Insurance Exchange.

ISSUE PRESENTED

The sole issue presented for our consideration is whether, under Maryland law, a liability insurance policy provision that excludes from coverage a mother’s bodily injury claims against a tortfeasor acts automatically to exclude the corresponding wrongful death claims of her adult children on the basis that they are “derivative.” For the reasons that follow, we shall dismiss the appeal.

FACTUAL BACKGROUND

On September 23, 2012, Elizabeth C. Colton was a passenger in a vehicle owned and operated by Seymour Baden. As the vehicle attempted to turn onto westbound Lakelands Drive in Gaithersburg, it was involved in a collision with a vehicle operated by Rachel Weintraub. Colton died as a result of injuries sustained in the collision.

Colton was not married to Baden, but the two resided together. Colton was survived by two adult sons, David and Joshua Colton, who, at the time of the accident, lived in Illinois and North Carolina, respectively. Some time after the accident, Baden died of causes unrelated to the accident.

On May 29, 2013, David and Joshua Colton filed a complaint in the Circuit Court for Montgomery County against Kivitz, as the personal representative of Baden's estate, and Weintraub. They asserted claims of wrongful death on their own behalf and a survival action on behalf of their mother.

Baden and Elizabeth Colton were the named insureds on two insurance policies. The first was an automobile liability policy with limits of \$250,000 per person and \$500,000 per accident. The second was a personal catastrophe policy, effective January 11, 2012 through January 11, 2013, with a limit of \$1,000,000. Erie Insurance Exchange denied coverage under the personal catastrophe policy for the claims that were asserted in the lawsuit filed by David and Joshua Colton.

Subsequently, Kivitz, as personal representative of Baden's estate, filed, in the Circuit Court for Montgomery County, a complaint for declaratory judgment, and later, an amended complaint for declaratory judgment, against Erie Insurance Company, Erie Insurance Exchange, David Colton, Joshua Colton, and Rachel Weintraub. The personal representative alleged that both Erie Insurance Company and Erie Insurance Exchange were the insurers who issued the two policies owned by Baden and Elizabeth Colton. The insurance companies denied that allegation and averred that Erie Insurance Exchange was the only insurer under the personal catastrophe policy.

The personal representative sought a declaration that the personal catastrophe policy provided liability coverage for Baden in the wrongful death and survival claims filed by

David and Joshua Colton. Erie Insurance Company and Erie Insurance Exchange denied that liability coverage was available for those claims because they were derivative of the claims of Elizabeth Colton's estate for bodily injury and death resulting from the accident. In addition, Erie Insurance Company sought to be dismissed from the declaratory judgment action on the ground that it was not a party to the insurance policy at issue.

Kivitz, as the personal representative of Baden, filed a motion for summary judgment. Erie Insurance Exchange filed an opposition and a cross-motion for summary judgment that requested a declaratory judgment to the effect that the insurance policy "issued by Erie Insurance Exchange does not provide liability coverage" for the wrongful death and survivor claims. In a footnote, Erie Insurance Exchange stated:

The Plaintiffs have brought suit against both Erie Insurance Exchange and Erie Insurance Company. The latter is not a legal entity, and it has requested that it be dismissed as a Defendant. Accordingly, this Opposition is being filed on behalf of the insurance carrier whose policy is at issue.

After a hearing on May 21, 2014, the circuit court denied the personal representative's motion for summary judgment and granted the cross-motion for summary judgment filed by Erie Insurance Exchange. The court also issued a judgment declaring that "Erie Insurance Exchange Policy Number Q25-1150030 does not provide insurance coverage for Seymour Baden or his Estate for wrongful death and survival claims asserted by David Colton and Joshua Colton, including such claims asserted in Montgomery County Circuit Court Case Number 377625-V." This appeal followed.

DISCUSSION

In Maryland, “a party may appeal from a final judgment entered in a civil or criminal case by a circuit court.” *See* Md. Code (1974, 2013 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article. An order constitutes a final judgment if it was “intended by the court as an unqualified, final disposition of the matter in controversy,” it adjudicated or completed the adjudication “of all claims against all parties,” and a “proper record of it” was made on the docket. *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989); Md. Rule 2-601; Md. Rule 2-602(a)(1). Until the circuit court has properly disposed of all claims in existence in a case, it has not entered a final appealable judgment. *Estep v. Georgetown Leather Design*, 320 Md. 277, 286 (1999). An order that adjudicates the rights of fewer than all of the parties, including rights under cross-claims or third-party claims, is not a final appealable judgment. Md. Rule 2-602(a); *Estep*, 320 Md. at 286-87. The Court of Appeals has explained that there are only three exceptions to the final judgment rule:

[W]e have made clear that the right to seek appellate review of a trial court’s ruling ordinarily must await the entry of a final judgment that disposes of all claims against all parties, and that there are only three exceptions to that final judgment requirement: appeals from interlocutory orders specifically allowed by statute; immediate appeals permitted under Maryland Rule 2-602; and appeals from interlocutory rulings allowed under the common law collateral order doctrine.

Salvagno v. Frew, 388 Md. 605, 615 (2005).

Because the absence of a final judgment might deprive a court of appellate jurisdiction, we may raise the issue of finality on our own motion. *Waterkeeper Alliance, Inc. v. Maryland Dep't of Agric.*, 439 Md. 262, 276 n.11 (2014). We do so here.

In the case before us, the personal representative's amended complaint for declaratory judgment was filed against a number of defendants including Erie Insurance Company and Erie Insurance Exchange. Both of those parties filed an answer in which they asserted, among other things, that Erie Insurance Company was neither a party to the insurance policy nor an interested party. Erie Insurance Company requested a dismissal with prejudice.

Subsequently, the personal representative filed a motion for summary judgment “on the issue of liability of Erie Insurance Company (“Erie”) under its Personal Catastrophe Policy No. Q25 1150030.” Only Erie Insurance Exchange responded to that motion. In its opposition, Erie Insurance Exchange noted that Erie Insurance Company had previously requested to be dismissed as a defendant. Erie Insurance Exchange also filed a cross-motion for summary judgment. Erie Insurance Company neither responded to the motions for summary judgment nor filed its own motion for summary judgment.

As we have already stated, the circuit court ultimately denied the personal representative's motion for summary judgment, granted the cross-motion for summary judgment filed by Erie Insurance Exchange, and declared that “Erie Insurance Exchange Policy Number Q25-1150030 does not provide insurance coverage for Seymour Baden or his

Estate for wrongful death and survival claims asserted by David Colton and Joshua Colton.”¹

At no time, however, did the circuit court dismiss or otherwise resolve the personal representative’s claims against Erie Insurance Company. Because the circuit court’s order did not resolve the personal representative’s claims against Erie Insurance Company, there was no final appealable judgment. As none of the exceptions to the final judgment rule apply in this case, we are without jurisdiction to consider this appeal.

**APPEAL DISMISSED; COSTS TO BE PAID
BY APPELLANT.**

¹ We note that in its written order the circuit court referred to “the Defendant Erie Insurance Company’s Cross-Motion for Summary Judgment,” but the docket entries correctly reflected that the cross-motion for summary judgment that was granted had been filed by Erie Insurance Exchange.