

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBIN LISTMAN,
Appellant/Cross-Respondent,

vs.

FOUR WINNS, INC.; OUTBOARD MARINE
CORPORATION; OMC RECREATIONAL
BOAT GROUP, INC.; RECREATIONAL
BOAT GROUP LIMITED PARTNERSHIP;
AND FOUR WINNS BOAT CO.,
Respondents/Cross-Appellants.

No. 52365

FILED

JUL 07 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DISMISSING APPEAL AND CROSS-APPEAL

This is an appeal and cross-appeal from a summary judgment in a personal injury case. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant/cross-respondent Robin Listman has filed a motion, seeking this court's determination of its appellate jurisdiction. In the motion, Listman asserts that several claims, including third-party claims concerning contribution and indemnity, appear to remain pending below, such that no final judgment has been entered. Listman also asks that the briefing schedule in this appeal and cross-appeal be suspended pending resolution of the jurisdictional question and for an order directing the district court to rule on her motion for reconsideration or NRCP 60(b) relief.

Respondents/cross-appellants oppose Listman's jurisdictional arguments, asserting that Listman abandoned certain claims, that Listman should be estopped from asserting that no final judgment exists because she filed a notice of appeal, and that the third-party claims below were severed from the action. They agree to any suspension of the briefing

schedule, although they oppose Listman's request for an order directing the district court to act.¹

Asserted jurisdictional issues

“Jurisdictional rules go to the very power of this court to act.” Rust v. Clark Cty. School District, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987). Accordingly, they must be “clear and absolute” so to provide fair notice, id., and parties cannot stipulate as to our appellate jurisdiction, see, e.g., State of Nevada v. Justice Court, 112 Nev. 803, 806, 919 P.2d 401, 403 (1996); Scherer v. State, 89 Nev. 372, 374, 513 P.2d 1232, 1233-34 (1973); Pacific L. S. Co. v. Ellison R. Co., 52 Nev. 279, 298-99, 286 P. 120, 124 (1930). A judgment that resolves less than all of the remaining claims and issues, except for post-judgment issues like attorney fees and costs, is not a final, appealable judgment. NRAP 3A(b)(1); Lee v. GNLV Corp., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000).

Here, based on our review of the parties' arguments and the documents before this court, we conclude that we lack jurisdiction over this appeal because no final, appealable judgment has been rendered. In particular, according to Listman's motion and docketing statements, respondents' responses thereto, and the documents submitted to this court, no written orders have been entered that resolve the following claims: (1) Listman's strict products liability claims (defective design and failure to warn) against (a) corporate officer defendants R.D. Randolph, T.J.

¹Respondents' request that Listman's motion be either denied for failure to comply with NRAP 27 or treated as a petition for a writ of mandamus is denied.

Taylor, D.J. Baddeley, D. O'Hara, and H. Malovany,² and (b) certain OMC defendants, including Four Winns, Inc., OMC Recreational Boat Group, Recreational Boat Group LP, and Four Winns Boat Co.³; (2) plaintiffs Amanda and Trevor Listman's claims against the corporate officer defendants and all OMC defendants⁴; (3) Cope & McPhetres, Inc. and Cope & McPhetres Marine, Inc.'s (a) cross-claims against Mark Porsow,⁵

²After the original claims against Malovany were dismissed, new claims were asserted against him in the amended complaint.

³Although the parties assert that Listman's claims against these defendants were resolved by the district court's July 16, 2008, summary judgment in favor of Outboard Marine Corporation, neither the text of that judgment nor its caption list the OMC defendants named above; therefore, it is unclear whether the claims against them have been resolved.

⁴While the district court entered an order on August 29, 2008, granting certain defendants' motion for a good faith settlement determination and dismissing "the claims brought by Amanda and Trevor Listman," the quoted statement was made in the context of the court's good faith settlement determination as to particular defendants; accordingly, the dismissal of Amanda and Trevor Listman's claims appears to pertain only to those settling defendants. And although it appears that Amanda and Trevor Listman's remaining claims may have been resolved by stipulated dismissal after this appeal and cross-appeal was filed, no such district court order has been submitted to this court. See Docketing Statement Question 22. Even if those claims have been resolved, however, many other claims remain pending, so jurisdiction still is lacking.

⁵Although the district court's April 28, 2005, order dismissed "the above-entitled action" in its entirety as to Porsow, it does not appear that that order resolved the cross-claims against Porsow, as the order's title did not mention the cross-claimants' action and the dismissal was based on a determination of good faith settlement between the Listmans and Porsow, but not the cross-claimants.

and (b) third-party claims against Volvo Penta Corporation; and (4) respondents' third-party claims against Volvo Penta Corporation and Volvo Penta Marine Products, L.P.

Despite lacking written district court orders formally resolving the noted claims, respondents argue that those claims have been resolved under various legal principles. For example, in respondents' October 2, 2008, response to Listman's docketing statement, they acknowledge that no written order adjudicating certain of Listman's claims has been entered, but they assert that because it was her duty to prepare such an order and the record is clear that she abandoned those claims, the lack of a written order is inconsequential for our jurisdictional purposes. That is not the case, however. We have consistently recognized that claims must be formally resolved by written order or in accordance with NRCP 41 for appellate jurisdiction purposes. See, e.g., KDI Sylvan Pools v. Workman, 107 Nev. 340, 810 P.2d 1217 (1991) (recognizing that a party's stated intention to abandon a claim does not operate as the formal adjudication necessary for this court's jurisdictional purposes).

Further, in their opposition to appellant's motion to determine jurisdiction, respondents assert that because Listman treated the summary judgment as final when she appealed from it, she is estopped from arguing that this court lacks jurisdiction. See Renfro v. Forman, 99 Nev. 70, 657 P.2d 1151 (1983). It is not clear that estoppel applies here, however, given the confusion created by the district court orders referenced above, the parties' actions and arguments below, and Listman's early attempts to determine appellate jurisdiction. See Marcuse v. Del Webb Communities, 123 Nev. 278, 287, 163 P.3d 462, 468-69 (2007) (noting the elements of judicial estoppel). Regardless, as parties cannot

stipulate to our jurisdiction, which we independently review, applying estoppel principles cannot confer jurisdiction where none exists.

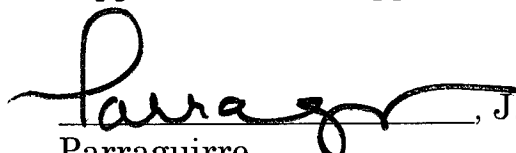
Next, respondents point out that, on September 16, 2008, after the original notices of appeal were filed, the district court “severed” the third-party claims. Respondents then assert that the severance resolved the third-party claims, such that any order adjudicating the other remaining claims in the matter is final without NRCP 54(b) certification. As respondents contend, however, it appears that the court’s “severance” was made pursuant to NRCP 42(b), which does not provide for severance, but rather, for separate trials. See, e.g., Corvello v. New England Gas Co., Inc., 247 F.R.D. 282, 285 (D.R.I. 2008) (noting that, although the terms “severance” and “separate trial” are sometimes used interchangeably, severing claims under FRCP 21 is distinguishable from separate trials under FRCP 42(b), and the distinction is meaningful for appellate jurisdiction purposes, since orders entered after the conclusion of a separate trial are often interlocutory and not appealable); Buurman v. Central Valley School Dist., 371 N.W.2d 146, 148 (N.D. 1985) (recognizing that an order resolving a motion under the North Dakota rule analogous to NRCP 42(b) did not result in severing the action under the rule analogous to NRCP 21). Accordingly, “severing” the third-party claims under NRCP 42(b), or rather, assigning them for separate trial, did not resolve those claims. See, e.g., Reno Hilton Resort Corp. v. Verderber, 121 Nev. 1, 106 P.3d 134 (2005) (recognizing that an order entered after the first phase of a bifurcated proceeding is not final, but interlocutory). As a result, those claims remain pending, and NRCP 54(b) certification could be appropriate once all of Listman’s claims are formally resolved, since she then would be completely removed from the action. See generally Buurman, 371 N.W.2d at 148.


Additional jurisdictional issues


Finally, it appears that to the extent the appealed district court summary judgment pertained to respondents, they prevailed below. Accordingly, while we need not decide the issue in light of the jurisdictional defects discussed above, we note that respondents apparently were not aggrieved by the district court order and therefore might lack standing to appeal. NRAP 3A(a); Valley Bank of Nevada v. Ginsburg, 110 Nev. 440, 874 P.2d 729 (1994).

As no final judgment has been rendered, we lack jurisdiction, and we

ORDER this appeal and cross-appeal DISMISSED.⁶


Parraguirre


Douglas


Pickering

cc: Hon. Jerome Polaha, District Judge
Nicholas F. Frey, Settlement Judge
Bradley Drendel & Jeanney
Law Office of Robert F. Vaage
Alvarez, Sambol, Winthrop & Madson, P.A.
Olson, Cannon, Gormley & Desruisseaux
Washoe District Court Clerk

⁶In light of this order, Listman's requests to hold the briefing schedule in abeyance and for an order directing the district court to resolve her motion for reconsideration or NRCP 60(b) relief are denied as moot.