

SUPREME COURT OF NEBRASKA

Florida ex rel. Department of Insurance v. Countrywide Truck Insurance Agency, Inc.

270 Neb. 454 (2005) · Decided September 30, 2005

SUMMARY

The Nebraska Supreme Court considered whether it had jurisdiction over an interlocutory appeal from the denial of a motion to recuse a district court judge. The court held that the order was neither final nor within the collateral-order exception because the recusal issue could be adequately reviewed after a final judgment. The appeal was dismissed for lack of jurisdiction.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	McCormack, J.
JURISDICTION	Nebraska
DECIDED	September 30, 2005
DISPOSITION	dismissed
PROCEDURAL POSTURE	Appellants appealed the Douglas County District Court's denial of their motion to recuse the district judge. They also had petitioned for a writ of mandamus compelling recusal, but the Nebraska Supreme Court denied that petition before addressing the appeal.
STANDARD OF REVIEW	A jurisdictional question not involving a factual dispute is determined as a matter of law, requiring the appellate court to reach an independent conclusion.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Countrywide Insurance Agency, Inc., David L. Fulkerson v. State of Florida on the relation of the Department of Insurance of the State of Florida

TOPICS

- appellate jurisdiction
- final judgment rule
- interlocutory appeal
- appellate procedure
- civil procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the Nebraska Supreme Court had appellate jurisdiction over an interlocutory order denying a motion to recuse a district judge.
2. Whether the denial of a recusal motion falls within the collateral-order exception to the final-order requirement.

HOLDINGS

1. An order denying a motion to recuse is not a final, appealable order and does not fall within the collateral-order exception when the alleged recusal issue can be fully reviewed on appeal from a final judgment in the underlying case.

KEY QUOTATIONS

“If an appeal from an order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client’s interests, interlocutory review is appropriate.” (457)

“Thus, the collateral order exception does not apply to the denial of a motion for recusal” (458)

FACTUAL BACKGROUND

The State of Florida, acting through its Department of Insurance as receiver for insolvent United Southern Assurance Company, sued Countrywide Truck Insurance Agency for allegedly collecting premiums but failing to remit them. The State also alleged that Countrywide Insurance Agency was Truck's alter ego and that David L. Fulkerson controlled both entities. After the district court denied appellants' partial-summary-judgment motion, appellants sought recusal based on alleged failure to distinguish Truck from the nondefaulting defendants and an allegedly inaccurate characterization of their motion.

PROCEDURAL HISTORY

The State of Florida sued Countrywide Truck Insurance Agency, Inc., Countrywide Insurance Agency, and David L. Fulkerson in the Douglas County District Court concerning allegedly unremitted insurance premiums and alter-ego liability. After the district court denied appellants' motion for partial summary judgment, appellants moved for recusal based on alleged judicial bias and an inaccurate description of their summary-judgment request. The district court denied recusal; the Supreme Court denied appellants' mandamus petition and dismissed the present appeal for lack of jurisdiction because the recusal order was neither final nor within the collateral-order exception.

DISPOSITION

dismissed

CASES CITED

- State of Florida v. Countrywide Truck Ins. Agency, 258 Neb. 113, 602 N.W.2d 432 (1999)
- Trainum v. Sutherland Assocs., 263 Neb. 778, 642 N.W.2d 816 (2002)
- Pennfield Oil Co. v. Winstrom, 267 Neb. 288, 673 N.W.2d 558 (2004)
- Richardson v. Griffiths, 251 Neb. 825, 560 N.W.2d 430 (1997)
- In re Martinez-Catala, 129 F.3d 213 (1st Cir. 1997)
- Nobby Lobby, Inc. v. City of Dallas, 970 F.2d 82 (5th Cir. 1992)
- Krieg v. Krieg, 743 A.2d 509 (Pa. Super. 1999)
- In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir. 1980)
- In re Cargill, Inc., 66 F.3d 1256 (1st Cir. 1995)
- State v. Forte, 150 Vt. 654, 553 A.2d 564 (1988)
- Alexander v. Chicago Park Dist., 709 F.2d 463, 470-71 (7th Cir. 1983)
- State v. Sklenar, 269 Neb. 98, 690 N.W.2d 631 (2005)
- Smith v. Lincoln Meadows Homeowners Assn., 267 Neb. 849, 678 N.W.2d 726 (2004)

OPINION

Florida ex rel. Department of Insurance v. Countrywide Truck Insurance Agency, Inc.
270 Neb. 454

MCCORMACK, J.

McCormack, J.

NATURE OF CASE

This is an appeal from the denial of a motion for recusal filed by the appellants, Countrywide Insurance Agency, Inc., and David L. Fulkerson.

BACKGROUND

A detailed recitation of the factual background of this case is set forth in *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, 602 N.W.2d 432 (1999). Set forth below are the facts relevant to the denial of the appellants' motion for recusal. The State of Florida on the relation of the Department of Insurance of the State of Florida is the receiver of United Southern Assurance Company, an insolvent insurance company. On January 12, 1998, the State of Florida filed a petition in the district court for Douglas County alleging that Countrywide Truck Insurance Agency, Inc. (Truck), collected premiums for United Southern Assurance Company but failed to remit them pursuant to the parties' agreement. The petition further alleged that Countrywide Insurance Agency is the "alter ego" of Truck and that Fulkerson is the operator, director, and controlling person of both Truck and Countrywide Insurance Agency. The appellants filed a motion for partial summary judgment on the issue of whether they are liable to the State of Florida based on the theory of alter ego. The motion was denied. Approximately 3 months later, the appellants filed a motion seeking the recusal of the district court judge based on partiality or bias. In their motion for recusal, the appellants argued that the district court judge should recuse himself

because (1) the court continually failed to make the distinction between the defaulting defendant, Truck, and the nondefaulting defendants, *456Countrywide Insurance Agency and Fulkerson, and that this action on the part of the court indicates a bias or prejudice, and (2) the court's order incorrectly observed that the motion for partial summary judgment requested that "[d]efendant Fulkerson should be dismissed from this lawsuit" when in fact there was no such request in the motion. On May 24, 2004, the district court overruled the appellants' motion for recusal. Prior to the denial of their motion, the appellants, on May 21, petitioned this court for a writ of mandamus compelling the recusal of the district court judge. Before any action had been taken on this outstanding petition, the appellants, on June 1, perfected the present appeal, contesting the district court's denial of their motion for recusal. On June 9, we denied the appellants' writ of mandamus. On appeal, the appellants argue that the district court erred in denying their motion for recusal.

ASSIGNMENT OF ERROR

The appellants allege that the district court erred in denying their motion for recusal.

STANDARD OF REVIEW

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 642 N.W.2d 816 (2002).

ANALYSIS

Before we address the appellants' assignment of error, we must determine whether this court has jurisdiction to adjudicate the instant appeal. In order for this court to possess jurisdiction, the district court's order denying the appellants' motion for recusal must be a final order or appealable under an exception to the final order requirement. Generally, for an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 *457(2004); *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997). The order in this case is not a final order, and it is not contended to be so by the appellants. Rather, the appellants claim that the order falls within the exception to the final order rule set forth in *Richardson v. Griffiths*, *supra*. In *Richardson*, we adopted the following exception to the final order requirement: If an appeal from an order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate. See *Trainum v. Sutherland Assocs.*, *supra*. We conclude that the *Richardson* collateral order exception does not apply in the instant case. We agree that in some cases, a motion for a trial judge to recuse himself or herself may be based on considerations that are collateral to the merits of the controversy. E.g., generally, Neb. Code of Jud. Cond., Canon 3E(1) (rev. 2000). But even assuming that an appeal from the denial of such a motion involves issues that are collateral to the basic controversy, the collateral order exception does not apply because the parties' interests can adequately be protected in an appeal from a judgment dispositive

of the entire cause. For this reason, it has generally been held that the collateral order exception to the finality requirement does not encompass an order denying a motion to recuse. See, e.g., *In re Martinez-Catala*, 129 F.3d 213 (1st Cir. 1997); *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82 (5th Cir. 1992); *Krieg v. Krieg*, 743 A.2d 509 (Pa. Super. 1999). Recusal questions are fully reviewable on an appeal from a final judgment, and, therefore, the collateral order exception is unavailable. See *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958 (5th Cir. 1980). See, also, *In re Cargill, Inc.*, 66 F.3d 1256 (1st Cir. 1995); *State v. Forte*, 150 Vt. 654, 553 A.2d 564 (1988). As stated by the Seventh Circuit, in a plaintiff's attempted appeal from a judge's refusal to disqualify himself, strong judicial policy considerations caution against allowing piecemeal appeals through the review of otherwise unappealable orders in the course of considering substantively unrelated interlocutory appeals.... Since the plaintiff will be able to obtain appellate review of the order denying *458disqualification after a final decision on the merits, thus allowing for a full contextual assessment of any possible appearance of impropriety ... we decline to contravene settled judicial policy in order to permit intermediate appeal on this issue. *Alexander v. Chicago Park Dist.*, 709 F.2d 463, 470-71 (7th Cir. 1983). We agree, and we reach the same conclusion. Thus, the collateral order exception does not apply to the denial of a motion for recusal, and the parties do not contend that the denial of this motion was a final, appealable order for any other reason. Cf. *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005) (concluding that denial of motions to discharge violation of probation and to recuse judge did not present final, appealable order). In the absence of a judgment or a valid order finally disposing of this case, we are without jurisdiction and, therefore, we cannot consider the appellants' assignment of error. See *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004). Appeal dismissed.