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REVERSE and REMAND and Opinion Filed October 21, 2008

In The
 Court of Appeals
 Fifth District of Texas at Dallas

.....
No. 05-07-01097-CV

CLARK & COMPANY, INC., Appellant

V.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Appellee

.....
On Appeal from the 44th Judicial District Court

Dallas County, Texas
 Trial Court Cause No. 03-03587-B

.....
 MEMORANDUM OPINION

Before Justices Morris, Whittington, and O'Neil
 Opinion By Justice O'Neil

Appellant Clark & Company, Inc. appeals an order striking its counterclaims against appellee St. Paul Fire & Marine Insurance Company (St. Paul Fire). The order became final when the trial court severed the counterclaims from St. Paul Fire's breach of contract suit against Clark & Co. In three issues, Clark & Co. contends the trial court erred in (1) striking its counterclaims, (2) refusing to strike St. Paul Fire's Sixth Amended petition in the main case, and (3) severing the stricken counterclaims. Because we conclude the trial court erred in severing the counterclaims, we reverse and remand to the trial court with instructions to order the counterclaims consolidated with the main case.

Clark & Co. is a managing general agent for high risk automobile insurance carriers. As such, Clark & Co. services automobile insurance policies, including collecting premiums, issuing policies, and paying claims. The relevant policies in this case were insured by State and County Mutual Fire Insurance Company and reinsured by St. Paul Fire.

St. Paul Re, Inc. is an agent of St. Paul Fire and, according to St. Paul Fire, also an assumed name of St. Paul Fire. In April 2003, St Paul Re filed an original petition against appellee Clark & Co. alleging Clark & Co. had breached a General Agency Agreement by improperly withdrawing almost a million dollars from a premium trust account. Neither St. Paul Re nor St. Paul Fire was a party to the General Agency Agreement, the only contract referenced in the original petition.

Clark & Co. answered St. Paul Re's suit with a general denial. Over the next two years, St. Paul Re filed first, second, third, and fourth amended petitions that continued to assert Clark & Co. had breached the General Agency Agreement, but now also referenced contractual addendums which allegedly made St. Paul Fire a party to that agreement. St. Paul Fire, however, was not named as a plaintiff in these amended petitions.

In August 2005, some two-and-a-half years after the original petition was filed, St. Paul Re and St. Paul Fire filed a Fifth Amended petition making St. Paul Fire a party to the litigation for the first time. Clark & Co. responded less than thirty days later with an amended answer and counterclaim. In its answer, Clark & Co. alleged St. Paul Re could not recover in the capacity in which it had sued because it never had a contractual relationship with Clark & Co. It also asserted several affirmative defenses with respect to St. Paul Fire's claims, including prior material breach, failure to mitigate, and failure to apply offsets and credits. Finally, it alleged affirmative breach of contract counterclaims against St. Paul Fire.

St. Paul Re and St. Paul Fire filed an emergency motion to strike claiming they were unfairly surprised by the amended answer and counterclaims. They complained the affirmative defenses and

counterclaims were raised only thirty days before the scheduled trial day, which at that time was October 3, 2005. In response, Clark & Co. asserted St. Paul Fire could not allege surprise or prejudice because St. Paul Fire had only become a party to the litigation in the Fifth Amended Petition and Clark & Co. promptly alleged its defenses and counterclaims after that time.

On September 25, 2005, a visiting judge granted the motion to strike and struck Clark & Co's amended answer and counterclaims. Meanwhile, St. Paul Re and St. Paul Fire filed a motion to substitute party under the doctrine of misnomer or as an assumed name. The visiting judge granted the motion to substitute and ordered St. Paul Fire be substituted in place of St. Paul Re in the Fifth Amended Petition and that the substitution relate back to the original petition. St. Paul Fire proceeded as the sole plaintiff.

In December 2006, over a year after the visiting judge struck Clark & Co.'s affirmative defenses and counterclaims, St. Paul Fire filed a Sixth Amended Petition asserting breach of contract based on "Reinsurance Slips" not previously relied upon. Clark & Co. filed a motion to strike the Sixth Amended Petition asserting unfair surprise. Clark & Co. also again attempted to raise its affirmative defenses to St. Paul Fire's claims and to bring its breach of contract counterclaims. St. Paul Fire moved to strike based on its previous assertion of surprise and prejudice. The case was heard by the trial court's presiding judge. After suggesting he was bound by the visiting judge's earlier interlocutory ruling, the trial judge struck Clark's second amended answer and counterclaims. *See Footnote 1* The judge also denied Clark & Co.'s motion to strike St. Paul Fire's Sixth Amended Petition. Clark & Co. refused to agree to an interlocutory appeal that could have allowed this Court to immediately review the orders striking Clark & Co.'s amended answer and counterclaims. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d) (Vernon (2008)). Because of Clark & Co.'s refusal, St. Paul Fire requested the trial court to sever the counterclaims "for appeal purposes and to also abate this lawsuit until the appeal is final in the severed cause." Clark & Co. responded that the claims were interwoven and the trial court could not properly sever the counterclaims for the sole purpose of forcing Clark & Co. to appeal only part of the case. The trial court granted St. Paul Fire's motion to sever the counterclaims and abated the underlying cause.

Texas Rule of Civil Procedure 41 provides that "any claim against a party may be severed and proceeded with separately." Tex. R. Civ. P. 41. We will not reverse a trial court's order severing a claim unless the trial court abused its discretion. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007). A claim is properly severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues. *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990) (op. on reh'g). A severance order should not be used to obtain an advisory opinion from the appellate court. *See Jones v. American Flood Research, Inc.*, 153 S.W.3d 718, 723 (Tex. App.-Dallas 2005), *rev'd on other grounds*, 192 S.W.3d 581 (Tex. 2006).

After reviewing the record before us, we conclude the trial court's severance in this case was an improper attempt to obtain an advisory opinion from this Court. In its motion to sever, St. Paul Fire did not claim it met the ordinary requirements for a severance. In fact, St. Paul Fire effectively conceded the claims were interwoven and could not proceed separately by requesting the trial court to abate the main case pending resolution of the appeal. The trial court granted St. Paul Fire's request, both severing the counterclaims and abating the main case pending this Court's determination of the appeal. The trial court's abatement of the main case evidences the severance was illusory, done solely to effectuate an interlocutory appeal that is not authorized by statute. By doing so, the trial court and appellee bypassed the requirement in section 51.014(d) that both parties agree to an interlocutory appeal even when (1) the order involves a controlling question of law and (2) an immediate appeal could materially advance the ultimate termination of the litigation. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d) (Vernon 2008). Moreover, because the rules involving interlocutory appeals are not implicated in this case, the severance has led to the very real danger of inconsistent rulings in the same case. In particular, there is nothing to prevent the trial court from reinstating the underlying case and changing its ruling striking

Clark & Co.'s amended answer in that part of the case that is not on appeal. *See In re Estate of Henry*, 250 S.W.3d 518, 526 (Tex. App.-Dallas 2008, no pet.)(trial judge has power to change interlocutory rulings at any time before judgment on the merits becomes final).

To justify its procedure, St. Paul Fire relies on authority that states there is no per se prohibition for severing a compulsory counterclaim. *See Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 525-26 (Tex. 1982). However, the issue presented here is not whether the trial court can sever a compulsory counterclaim, but whether the trial court can sever a claim to force a party to appeal only part of the case and thereby obtain an advisory opinion from this Court. In other words, the trial court and appellee were seeking to force Clark & Co. to obtain a ruling that would apply not only to the counterclaim, but also to whether the trial court properly struck Clark & Co.'s affirmative defenses to the main case. While we do have jurisdiction over the trial court's order striking the counterclaims, we have no jurisdiction over whether the trial court properly struck the affirmative defenses. *See Jones*, 153 S.W.3d at 723 (appellate court has jurisdiction over appeal from improperly severed claims). Whether the trial court properly struck the affirmative defenses and counterclaims should be made by the same court in the same proceeding. We resolve the third issue in Clark & Co.'s favor. We reverse the trial court's severance order and remand to the trial court with orders for the trial court to consolidate this case with cause number 07-05306-B.

MICHAEL J. O'NEILL
JUSTICE

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Footnote 1 In reference to the motion to strike, the trial judge stated he could not “review” the visiting judge's previous decision.

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