

Case No. 07-2150

IN THE SUPREME COURT OF OHIO

STYRK WALBURN, <i>et al.</i> ,)	
)	Discretionary Appeal from
Plaintiffs-Appellees,)	the Vinton County Court
)	of Appeals, Fourth
v.)	Appellate District
)	
WENDY SUE DUNLAP,)	
)	
Defendant,)	Court of Appeals
)	Case No. 06 CA 655
and)	
)	
NATIONAL UNION FIRE INSURANCE)	
COMPANY OF PITTSBURGH, PA,)	
)	
Defendant-Appellant.)	

**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PENNSYLVANIA**

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An entry granting partial summary judgment in a special proceeding which fails to address or resolve the plaintiff’s demand for damages is not a final, appealable order despite the trial court’s certification pursuant to Civil Rule 54(B). [R.C. § 2505.02 and Civil Rule 54(B), interpreted].

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Civil Rule 54(B) certification of an entry granting partial summary judgment in favor of an insured and against an insurer with respect to the insured’s entitlement to uninsured/underinsured motorist coverage does not serve sound judicial administration, and therefore, is improper, where the insured’s claim against the alleged tortfeasor remains pending. [Civil Rule 54(B), interpreted; *Wisintainer v. Elcen Power Strut. Co.* (1993), 67 Ohio St.3d 352, 617 N.E.2d 1136, applied].

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I. EXPLANATION OF WHY THIS CASE INVOLVES ISSUES OF PUBLIC OR GREAT GENERAL INTEREST

On August 28, 2006, the Court of Common Pleas for Vinton County, Ohio (“Trial Court”) entered partial summary judgment in favor of Plaintiffs-Appellees, Styrc and Wendy Walburn (the “Walburns”), and against Defendant-Appellant, National Union Fire Insurance Company of Pittsburgh, Pennsylvania (“National Union”), holding that the Walburns were entitled to uninsured motorist coverage under various commercial insurance policies issued by National Union to Mr. Walburn’s employer, Sherwin-Williams. The decision failed to address or resolve the Walburns’ claim for damages, which remains pending. Moreover, the Trial Court entered judgment against National Union without resolving the Walburns’ claim against the alleged tortfeasor, Wendy Sue Dunlap (“Dunlap”), who was also a party to the case. Nevertheless, the Trial Court certified its decision as a final, appealable order pursuant to Civil Rule 54(B).

In its October 2, 2007 Decision and Judgment Entry of Dismissal (“Judgment Entry”), the Court of Appeals, Fourth Appellate District (“Fourth District”) held that, because the Walburns sought a declaration of their rights under National Union’s policies, the Trial Court’s August 28, 2006 decision was entered in a “special proceeding,” and therefore, appealable pursuant to R.C. § 2505.02(B)(2), and properly certified pursuant to Civil Rule 54(B).

National Union respectfully submits that the present case involves issues of public or great general interest because, despite this Court’s previous decisions on the subject, there remains considerable confusion as to what constitutes a final, appealable order, and particularly, in cases where the order is issued in a special proceeding or where the order

involves issues central to other claims or counterclaims raised in the action which remain pending. Indeed, in its Judgment Entry, the Fourth District acknowledged “that determining what is a final, appealable order can be difficult in litigation involving multiple parties and claims.” (Judgment Entry at ¶ 9). As a result of this confusion, trial courts have typically erred in favor of certification in questionable cases, fostering a multitude of appeals that are eventually dismissed for want of appellate jurisdiction.¹

Although some confusion is inevitable, the Fourth District’s Judgment Entry, if not addressed, will only exacerbate this problem, as:

1. The Judgment Entry is in conflict with Court of Appeals, Tenth Appellate District’s decision in *Tinker v. Oldaker*, 10th App. Dist. Nos. 03AP-671, 03AP-1036, 2004-Ohio-3316; the Court of Appeals, Second Appellate District’s decision in *Beheshtaein v. American State Ins. Co.*, 2nd App. Dist. No. 20839, 2005-Ohio-5907; the Court of Appeals, Fourth Appellate District’s decisions in *Evans v. Rock Hill Local School Dist. Bd. Of Edn.*, 4th App. Dist. No. 04CA39, 2005-Ohio-5318 and *Nungester v. Transcontinental Ins. Co.*, 4th App. Dist. Nos. 03CA2744, 03CA2749, 2004-Ohio-3316; and the Court of Appeals, Ninth Appellate District’s decision in *Walter v. Allstate Ins. Co.*, 9th App. Dist. No. 21032, 2002-Ohio-5775, in which the Court’s held an judgment, order or decree in a special

¹ See, e.g. *Zunshine v. Cott*, 10th App. Dist. No. 06AP-868, 2007-Ohio-1475; *Miller v. Miller*, 11th App. Dist. No. 2007-T-0065, 2007-Ohio-5212; *Spano Bros. Constr. Co., Inc. v. Adolph Johnson & Son Co., Inc.*, 9th Dist. App. No. 23405, 2007-Ohio-1427; *Rockford Homes, Inc. v. Handel*, 5th App. Dist. No. 07CA006, 2007-Ohio-2581; *In re Smith*, 4th App. Dist. No. 05CA15, 2006-Ohio-4385; *Wyse v. Ameritech Corp.*, 2nd Dist. App. No. 21371, 2006-Ohio-979; *Circelli v. Keenan Constr.*, 165 Ohio App.3d 494, 847 N.E.2d 39, 2006-Ohio-949; *Miller v. First Internatl. Fid. & Trust Bldg., Ltd.*, 165 Ohio App.3d 281, 846 N.E.2d 87, 2006-Ohio-187; *Beheshtaein v. American State Ins. Co.*, 2nd App. Dist. No. 20839, 2005-Ohio-5907; *Pettit v. Continental Cas. Co.*, 11th App. Dist. No. 2005-L-087, 2005-Ohio-5484; *Evans v. Rock Hill Local School Dist. Bd. Of Edn.*, 4th App. Dist. No. 04CA39, 2005-Ohio-5318; *Messina v. Van Ness Stone, Inc.*, 11th App. Dist. No. 2005-G-2621, 2005-Ohio-4483; *Salata v. Vallas*, 159 Ohio App.3d 108, 823 N.E.2d 50, 2004-Ohio-6037; *Tinker v. Oldaker*, 10th App. Dist. Nos. 03AP-671, 03AP-1036, 2004-Ohio-3316; *In re Tracy M.*, 6th App. Dist. No. H-04-028, 2004-Ohio-5756; *Std. Plumbing & Heating Co. v. Hartman*, 5th App. Dist. No. 2003CA0091, 2004-Ohio-3964; *Nungester v. Transcontinental Ins. Co.*, 4th App. Dist. No. 03CA2744, 03CA2749, 2004-Ohio-3857; *McKenzie v. Payne*, 8th App. Dist. No. 83610, 2004-Ohio-2341; *Gaspar, Inc. v. Scott Process Systems, Inc.*, 5th Dist. App. No. 2003CA00133, 2003-Ohio-6848; *Palmer v. Pheils*, 5th App. Dist. No. 03CAE04025, 2003-Ohio-6114; *International Managed Care Strategies v. Franciscan Health Partnership*, First App. Dist. No. C-010634, 2002-Ohio-4801; *Fisher v. Fisher*, 10th App. Dist. No. 01AP-1041, 2002-Ohio-3086; *Walter v. Allstate Ins. Co.*, 9th App. Dist. No. 21032, 2002-Ohio-5775.

proceeding which does not dispose of the plaintiff's claim for damages is not a final, appealable order despite certification pursuant to Civil Rule 54(B)²; and

2. The Judgment Entry ignores this Court's pronouncement in *Wisintainer v. Elcen Power Strut. Co.* (1993), 67 Ohio St.3d 352, 617 N.E.2d 1136 that Civil Rule 54(B) certification is improper unless an immediate appeal serves sound judicial administration, and is in conflict with the Court of Appeals, First Appellate District's decision in *Ranlom, Inc. v. Mikulic* (Feb. 5, 1999), First App. Dist. No. C-971066, 1999 WL 49358; the Fourth District's decisions in *Portco, Inc. v. Eye Specialists Inc.*, Fourth App. No. 06CA3127, 2007-Ohio-4403 and *Oakley v. Citizens Bank of Logan*, Fourth App. Dist. No. 04CA25, 2004-Ohio-6824; and the Court of Appeals, Seventh Appellate District's decisions in *Salata v. Vallas*, 159 Ohio App.3d 108, 823 N.E.2d 50, 2004-Ohio-6037 and *Regional Imaging Consultants Corp. v. Computer Billing Services, Inc.*, Seventh App. Dist. No. 00 CA 2001, 2001-Ohio-3457, in which the courts held that Civil Rule 54(B) certification is improper where the judgment, order or decree appealed involves issues central to other claims or counterclaims raised in the action that have not been resolved.

As a result of this increased confusion, the number of decisions improperly certified for review will increase, causing delays in Ohio's trial courts as cases are stayed pending appeal, additional strain on the limited resources of Ohio's appellate courts, and a procedural nightmare for litigants involved in those cases.

National Union's experience is illustrative. In *Tinker v. Oldaker*, 10th App. Dist. Nos. 03AP-671, 03AP-1036, 2004-Ohio-3316, the trial court granted partial summary judgment against National Union, holding that the plaintiff was entitled to partial summary judgment on the issue of insurance coverage. The court failed to address the issue the plaintiff's damage claim, but nevertheless, certified its decision pursuant to Civil Rule 54(B). Believing the decision was an appealable order, National Union filed a

² National Union has filed a Motion to Certify this conflict with the Fourth District.

notice of appeal with the Court of Appeals, Tenth Appellate District (“Tenth District”), and the parties fully briefed the case. However, instead of reaching the merits of the appeal, the Tenth District dismissed the case for want of appellate jurisdiction, finding that the trial court’s decision was not a final, appealable order because it did not resolve the plaintiff’s claim for damages. In total, from the date of appeal to the date of remand, the case was delayed over eight months, to the detriment of both parties.

In the present case, based upon the Tenth District’s decision in *Tinker* and the Court of Appeals, Second Appellate District’s subsequent decision in *Beheshtaein v. American State Ins. Co.*, 2nd App. Dist. No. 20839, 2005-Ohio-5907, National Union filed a Motion for Reconsideration with the trial court challenging the court’s certification of its August 28, 2006 decision in order to forego a lengthy and unnecessary appeal. The trial court eventually agreed, and vacated its decision on grounds that it was not a final, appealable order, but not until the very day National Union’s Notice of Appeal was due, forcing National Union to perfect its appeal. National Union then moved the Fourth District to dismiss its appeal pursuant to Appellate Rule 28 on grounds that the August 28, 2006 decision was not a final, appealable order, which the Fourth District granted.

The trial court subsequently granted a second motion for partial summary judgment filed by the Walburns, and National Union again appealed on December 27, 2006. The parties fully briefed the case, but on June 19, 2007, the Fourth District *sua sponte* questioned whether the August 28, 2006 decision was, in fact, a final, appealable order, and required the parties to brief the issue. On October 2, 2007, the Fourth District reached the opposite conclusion reached by the Tenth District in *Tinker*, finding that August 28, 2006 decision was a final, appealable order, and holding that National

Union's December 27, 2006 was untimely. At present, the case has been delayed over fifteen months while the parties attempt to determine whether the trial court's Civil Rule 54(B) certification was proper.

As evidenced by the number of appeals dismissed due to improper Civil Rule 54(B) certification, National Union's experience is not an isolated incident, and the situation will only worsen if the conflict created by the Fourth District's decision is left unaddressed. Accordingly, National Union respectfully requests that the Court grant jurisdiction, and hear this case on its merits.

II. STATEMENT OF THE FACTS AND CASE

On January 22, 2003, the Walburns filed suit against Dunlap, Ohio Mutual Insurance Company, National Union and The Cincinnati Insurance Company. In their Complaint, the Walburns alleged, among other things, that Styrk Walburn was injured in an automobile accident directly and proximately caused by the negligence of Dunlap, who the Walburns claimed was "an uninsured or underinsured motorist under Ohio law." The Walburns further alleged that:

14. National Union issued a policy of insurance bearing policy No. RM CA 320-88-30 to named insured, the Sherwin Williams Company, with a policy period of 5/1/98 to 5/1/01.

15. The National Union Policy provided liability coverage with a liability limit of Two Million Dollars (\$2,000,000.00).

16. National Union attempted to obtain a rejection of uninsured/underinsured motorist coverage, but the purported rejection does not comply with the requirements of Ohio law.

17. Defendant National Union also issued certain umbrella policies which provided excess of umbrella coverage to that set forth in Policy RM CA 320-88-30.

18. Due to Defendant National Union's failure to comply with Ohio's law with regard to the purported rejection of uninsured/underinsured motorist coverage, plaintiffs have good grounds to believe the umbrella policies issued by Defendant National Union may also provide uninsured/underinsured motorist coverage with regard to damage sustained by the Plaintiffs as a result of the accident of January 23, 2001.

19. Pursuant to the terms of the National Union Policy and according to law, the Plaintiffs were insured under the policy.

20. As a result of all the above, Plaintiffs have been damaged in an amount which is in excess of Twenty-Five Thousand Dollars (\$25,000.00).

By their Prayer, the Walburns sought a declaration of their rights as well as judgment against all of the defendants "in an amount which will adequately compensate them for their damages, said amount being in excess of Twenty-Five Thousand Dollars (\$25,000.00)."

On March 31, 2004, the Walburns served their Motion for Partial Summary Judgment seeking a declaration that "uninsured motorist coverage exists for the Plaintiffs by operation of law concerning the National Union commercial liability policy as well as the aforementioned umbrella policy." The Walburns did not seek judgment against Dunlap, the alleged tortfeasor, or with respect to the amount of compensatory damages recoverable should they prevail on the issue of coverage.

On August 28, 2006, the Trial Court granted the Walburns' Motion for Partial Summary Judgment, finding that the Walburns were entitled to UM/UIM coverage under the commercial automobile and umbrella policies issued by National Union. The court did not award damages, but certified its decision pursuant to Civil Rule 54(B) by including the language "no just cause for delay."

As set forth above, National Union filed a Motion for Reconsideration challenging the Trial Court's Civil Rule 54(B) certification and filed a Notice of Appeal with the Fourth District, but moved the court to dismiss the appeal for want of a final, appealable order after the trial court vacated its decision. On October 4, 2006, the Fourth District granted National Union's Motion and dismissed the appeal.

On December 7, 2006, Plaintiffs-Appellees served a Second Motion for Summary Judgment. Without affording National Union an opportunity to respond, the Trial Court granted this motion on December 12, 2006. On December 27, 2006, National Union filed a timely appeal of the Trial Court's December 12, 2006 judgment entry.

On June 19, 2007, nearly four months after the parties completed briefing, the Fourth District issued a judgment entry in which it *sua sponte* questioned whether the Trial Court had jurisdiction to vacate its August 28, 2006 judgment entry on September 25, 2006 in light of the notice of appeal filed that same day, and thus, whether National Union's December 27, 2006 appeal was timely. The Fourth District further ordered National Union to submit a memorandum in support of jurisdiction.

In response, National Union filed a memorandum in which it argued that the Trial Court had improperly certified both its August 28, 2006 and December 12, 2006 judgment entries as final, appealable orders, and thus, that the first appeal was properly dismissed, and that the second appeal should be dismissed, because the Fourth District lacked appellate jurisdiction to hear the case.

On October 2, 2007, the Fourth District concluded that the Trial Court's August 28, 2006 decision was a final, appealable order:

The August 28, 2006 entry effectively terminated the action with respect to National Union because it arose in a special proceeding

and the finding of coverage affected a substantial right. It became appealable by virtue of its no just reason for delay language.

Walburn v. Dunlap, 4th App. Dist. No. 06CA655, ¶ 12.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

First Proposition of Law:

An entry granting partial summary judgment in a special proceeding which fails to address or resolve the plaintiff's demand for damages is not a final, appealable order despite the trial court's certification pursuant to Civil Rule 54(B). [R.C. § 2505.02 and Civil Rule 54(B), interpreted].

Second Proposition of Law:

An entry granting partial summary judgment in favor of an insured declaring that the insured is entitled to coverage, but which fails to address or resolve the insured's demand for damages, is not a final, appealable order despite the trial court's certification pursuant to Civil Rule 54(B). [R.C. § 2505.02 and Civil Rule 54(B), interpreted].

Under Ohio law, a judgment, order or decree which resolves some, but not all, of the claims in an action, although interlocutory, may nevertheless be immediately appealable if it falls within one of the categories set forth under R.C. § 2505.02. Decisions rendered in a special proceeding, such as a declaratory judgment action, are immediately appealable pursuant to R.C. § 2505.02(B)(2) if the decision affects a substantial right and is properly certified pursuant to Civil Rule 54(B). *Wisintainer v. Elcen Power Strut. Co.* (1993), 67 Ohio St.3d 352, 617 N.E.2d 1136.

However, in a breach of contract case, an order which interprets the contract and sets forth the parties' rights, but fails to award damages, is not a final, appealable, order, and should not be certified as such. *Adkins v. Bratcher*, 4th Dist. App. No. 06CA53, 2007-Ohio-3587, at ¶ 8. Confusion arises where a claim is styled as a declaratory judgment action, but in addition to a declaration of rights, the plaintiff seeks damages. Most courts

have concluded that substance prevails over style, such that the action will be construed as one for breach of contract even though resolution of that claim may require a declaration of the parties' rights. *Ohio and Vicinity Regional Council of Carpenters v. McMarty*, 11th App. Dist. No. 2005-T-0063, 2006-Ohio-2019, at ¶¶ 10-12; *Regional Imaging Consultants Corp. v. Computer Billing Services, Inc.*, 7th Dist. App. No. 00 CA 79, 2001-Ohio-3457. In such cases, the courts have held that decisions finding liability under the contract, but deferring the issue of damages, are not final, appealable orders.

In *Tinker*, the Tenth District applied this reasoning, and held that an order granting an insured partial summary judgment declaring his rights under an insurance policy, but failing to address the insured's damage claim, was not appealable:

This court's jurisdiction is limited to the review of judgments or final orders of trial courts. In order to determine whether an order is final and appealable, we must consider whether the order meets the requirements of R.C. 2505.02, and if applicable, Civ.R. 54. Under R.C. 2505.02, an order is final and may be reviewed, affirmed, modified, or reversed "when it is one of the following: (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment." The Supreme Court of Ohio has previously recognized a declaratory judgment action as a "special proceeding."

Here, the amended complaint arguably seeks, in part, a declaration that Mr. and Mrs. Tinker were insureds under the respective policies. However, the amended complaint clearly seeks damages from CIC and National Union (via ABB) under the applicable policies. The trial court did not reach the issue of damages prior to National Union's notice of appeal. We are cognizant that the trial court included language, pursuant to Civ.R. 54(B), stating that there was no just cause for delay.

Under Civ.R. 54(B), "[w]hen more than one claim for relief is presented in an action * * * or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay." However, the inclusion of the certification language does not turn an otherwise non-final order into a final appealable order. The order appealed from must

be final *as defined* by R.C. 2505.02. “An order that affects a substantial right is ‘one which, if not immediately appealable, would foreclose appropriate relief in the future.’”

In this case, the amended complaint seeks damages for injuries sustained as a result of the accident. The trial court has not yet addressed damages. We find that if review is delayed until after appellees' action is fully adjudicated, National Union still has appropriate relief available to it in the future, in the form of another appeal. Thus, even assuming the order was rendered in a special proceeding, it does not “affect” a substantial right. Accordingly, we conclude the trial court's decision granting appellees' motion for summary judgment and denying National Union's motion is not a final appealable order and we lack jurisdiction to rule on appellant's assignments of error.

Therefore, appellant's case number 03AP-1036 is dismissed.

Tinker v. Oldaker, 10th App. Dist. Nos. 03AP-671, 03AP-1036, 2004-Ohio-3316, at ¶¶ 11 – 14, *accord*, *Beheshtaein v. American State Ins. Co.*, 2nd App. Dist. No. 20839, 2005-Ohio-5907; *Walter v. Allstate Ins. Co.*, 9th App. Dist. No. 21032, 2002-Ohio-5775.

In the present case, the Fourth District reached the opposite conclusion, and found that the Trial Court's order was immediately appealable despite the fact the trial court had not reached the Walburns' damage claim.

National Union respectfully submits that *Tinker*, *Beheshtaein* and *Walter* represent the better reasoned, majority view, and request this Court accept jurisdiction to resolve this conflict.

Third Proposition of Law:

Civil Rule 54(B) certification of an entry granting partial summary judgment in favor of an insured and against an insurer with respect to the insured's entitlement to uninsured/underinsured motorist coverage does not serve sound judicial administration, and therefore, is improper, where the insured's claim against the alleged tortfeasor remains pending. [Civil Rule 54(B), interpreted; *Wisintainer v. Elcen Power Strut. Co.* (1993), 67 Ohio St.3d 352, 617 N.E.2d 1136, applied].

Even if an interlocutory order falls within one of the exceptions set forth under R.C. 2505.02, it is not appealable unless it is properly certified under Civil Rule 54(B). *Wisintainer v. Elcen Power Strut. Co.* (1993), 67 Ohio St.3d 352, 354, 617 N.E.2d 1136, 1138. Determination of whether an interlocutory order should be certified requires a factual determination whether an interlocutory appeal is consistent with interests of sound judicial administration. *Id.*

In *Portco, Inc. v. Eye Specialists Inc.* (Aug. 15, 2007), Fourth App. No. 06CA3127, 2007-Ohio-4403, the Fourth District dismissed the appeal for want of appellate jurisdiction, despite the fact the trial court's order included the language "no just reason for delay," based upon the authority of *Wisintainer*. The trial court had entered a partial, final order on the claims raised in the appellee's complaint, but did not decide the appellant's counterclaim which involved the same facts, legal issues and circumstances as the appellee's claims. This Fourth District concluded that the trial court's certification of its order did not serve "sound judicial administration," and that judicial economy and justice were better served by resolving the claims together. Accordingly, this Fourth District struck the trial court's certification and dismissed the appeal for want of jurisdiction. *See also, e.g., Ranlom, Inc. v. Mikulic* (Feb. 5, 1999), First App. Dist. No. C-971066, 1999 WL 49358; *Oakley v. Citizens Bank of Logan*, Fourth App. Dist. No. 04CA25, 2004-Ohio-6824; *Salata v. Vallas*, 159 Ohio App.3d 108,

823 N.E.2d 50, 2004-Ohio-6037; *Regional Imaging Consultants Corp. v. Computer Billing Services, Inc.*, Seventh App. Dist. No. 00 CA 2001, 2001-Ohio-3457.

In the present case, in addition to their claim against National Union, the Walburns filed a negligence claim against Dunlap, the alleged tortfeasor. These claims, however, overlapped because, in order to prove their entitlement to uninsured motorist coverage under the policies issued by National Union, the Walburns were first required to prove that Dunlap was a person liable in tort.

On April 2, 2004, the Walburn sought partial summary judgment against National Union, but did not ask the Trial Court to decide his negligence claim against Dunlap. On August 28, 2006, the trial court granted the Walburns' motion for partial summary judgment without resolving the Walburns' negligence claim. Thus, as in *Portco*, the Trial Court's decision failed to resolve a pending claim that involved the same facts, legal issues and circumstances as the Walburns' action for declaratory judgment, and therefore, should not have been certified as a final, appealable order. National Union raised this argument in both its Motion for Reconsideration, and the Walburns conceded the order's deficiency as, on December 11, 2006, they filed a second motion for summary judgment seeking reaffirmance of the August 28, 2006 decision against National Union *and* summary judgment against Dunlap. Nevertheless, on October 2, 2007, the Fourth District held that the August 28, 2006 decision was properly certified.

National Union respectfully submits that *Portco*, *Ranlom*, *Oakley*, *Salata*, and *Regional Imaging Consultants*, represent the better reasoned, majority view, and request this Court accept jurisdiction to resolve this conflict.

V. CONCLUSION

For the foregoing reasons, National Union respectfully submits that this case involves issues of public and great general interest, and therefore, respectfully requests this Court to grant jurisdiction, and review the present matter upon its merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was served, via regular mail, this 15th day of November,

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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
VINTON COUNTY

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Styrk Walburn, et al., :
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 Plaintiffs-Appellees, : Case No. 06CA655
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 v. :
 :
 Wendy Sue Dunlap, et al., :
 :
 Defendants, :
 :
 and : DECISION AND JUDGMENT ENTRY
 : OF DISMISSAL
 National Union Fire Insurance :
 Company of Pittsburgh, PA., :
 :
 Defendant-Appellant.

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C. Russell Canestraro, AGEE, CLYMER, MITCHELL & LARET, Columbus, Ohio, for Appellees.

Harsha, J.

{¶1} This matter is before us on the issue of our jurisdiction to review the trial court's December 12, 2006 judgment. Appellant complains that the parties have not raised the issue and that we have waited until after the completion of briefing to question our authority to decide this case. However, it was not apparent a jurisdictional problem existed until we began our review of the merits. More importantly, we have a duty to raise the issue sua sponte because it is improper for us to proceed in the absence of jurisdiction.

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{¶12} In January 2003, appellees, Styrk and Betty Walburn, filed a complaint naming Wendy Sue Dunlap, Ohio Mutual Insurance Group, The Cincinnati Insurance Company, and appellant, National Union Fire Insurance Company of Pittsburgh, PA, as defendants. The Walburns alleged that Styrk had been injured in an automobile accident caused by Dunlap while Styrk was in the course and scope of his employment with The Sherwin-Williams Company. They also claimed that Dunlap was either uninsured or underinsured at the time of the accident, and that they therefore were entitled to UM/UIM coverage through their insurance company, Ohio Mutual, Betty's employer's insurance company, Cincinnati Insurance, and National Union, which insured Sherwin-Williams.

{¶13} On February 4, 2005, the trial court granted summary judgment to National Union. Although the trial court's entry dismissed National Union as a party to the action, the court did not include a finding that there was no just reason for delay. Thus, it was not a final appealable order because the case involved multiple parties and claims. See Civ.R. 54(B) and *General Acc. Ins. v. Ins. Co. of North America* (1989), 44 Ohio St.3d 17, 20.

{¶14} On February 18, 2005, appellees filed a motion asking the trial court to reconsider its decision. On August 25, 2006, the trial court vacated its February 4, 2005 judgment. Because the February 4, 2005 order was not final, the trial court had jurisdiction to reconsider it. See *Id.* and *Pitts v. Ohio Dept. of Transportation* (1981), 67 Ohio St.2d 379, fn.1, 423 N.E.2d 1105.

{¶15} On August 28, 2006, the trial court granted the Walburns summary judgment and denied National Union's similar request, finding that the Walburns were

entitled to coverage up to \$2,000,000. This time, the trial court included the Civ.R. 54(B) language concerning no just reason for delay.

{¶16} On September 14, 2006, National Union filed a motion for reconsideration of the August 28, 2006 judgment in favor of the Walburns. On September 25, 2006, National Union filed a notice of appeal from that judgment with this court (Vinton App. No. 06CA653). Later that same day, however, the trial court vacated its August 28, 2006 judgment because it incorrectly concluded that judgment was not a final appealable order as it did not terminate the entire action. On September 28, 2006, National Union filed a motion to voluntarily dismiss its appeal. We granted the motion on October 4, 2006. See, Vinton App. No. 06CA653.

{¶17} On December 12, 2006, the trial court issued another judgment granting the Walburns' motion for summary judgment and denying National Union's motion. National Union filed its notice of appeal in this case (Vinton App. No. 06CA655) on December 27, 2006.

{¶18} After reviewing the record and the memoranda of the parties, we conclude we do not have jurisdiction to review the appeal filed by National Union on December 27, 2006. App.R. 4(A) requires an appellant to file the notice of appeal within thirty days of the filing of a final judgment from which it appeals. The trial court's August 28, 2006 judgment, which it unsuccessfully attempted to vacate, is the final appealable order finding coverage in favor of the Walburns, not the December 27, 2006 entry.

{¶19} We acknowledge that determining what is a final appealable order can be difficult in litigation involving multiple parties and claims. In order to make that determination, we engage in a two step process. First, we look at R.C. 2505.02 to see if

the order is "final." Second, if it is final, we must then look to see if Civ.R. 54(B) language is required. *General Acc. Ins.*, supra, at 21.

{¶10} R.C. 2505.02 states:

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

* * *

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment.

Declaratory judgment actions are special proceedings and a determination on the issue of insurance coverage affects a substantial right of both the insured and the insurer. *General Acc. Ins.* at 21-22. Thus, the August 23, 2006 judgment was a final order. Because the litigation involved multiple claims and parties, and the August 28, 2006 judgment did not adjudicate them all, Civ.R. 54(B) applied. After the trial court found that there was no just reason for delay, this order was both final and appealable. See Civ.R. 54(B) and *General Acc. Ins.* at 20. See also, *Stewart v. State Farm Mutual Automobile Ins. Co.*, Lucas App. No. L-05-1285, 2005-Ohio-5740, ¶17 et seq.

{¶11} National Union did initially appeal the August 28, 2006 judgment.

However, it subsequently voluntarily dismissed that appeal in misguided reliance on the trial court's reconsideration entry of September 25, 2006, which attempted to vacate its prior order. However, the motion for reconsideration and the trial courts corresponding judgment were nullities because there is no mechanism for a trial court to reconsider a final order. See *Pitts* at 378.

{¶12} The December 12, 2006 judgment is not the final appealable order from

which National Union may appeal. The August 28, 2006 entry effectively terminated the action with respect to National Union because it arose in a special proceeding and the finding of coverage affected a substantial right. It became appealable by virtue of its no just reason for delay language. See Civ.R. 54(B) and *General Acc. Ins.*, supra. See also, *Stewart*, supra at ¶18 explaining the different treatment awarded special proceedings and ordinary actions such as breach of contract or tort. On October 4, 2006, when we granted National Union's motion to voluntarily dismiss the appeal in Vinton App. No. 06CA653, the right to appeal the trial court's August 28, 2006 declaration of the Walburns' right to coverage was effectively terminated.

{¶13} Accordingly, we dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

Kline, J., Dissenting:

{¶14} I respectfully dissent. The majority finds that we do not have jurisdiction to review this December 12, 2006 judgment because the August 28, 2006 judgment, which contained Civ.R. 54(B) language, was the final, appealable judgment and National Union failed to appeal that judgment within thirty days. Because, in my view, the August 28 judgment was not a final, appealable order, I disagree.

{¶15} On December 27, 2006, National Union filed an appeal from the trial court's December 12, 2006 entry. National Union's sixth assignment of error raises the final, appealable order issue. It states that "THE TRIAL COURT ERRED IN CERTIFYING ITS DECISION WITH RESPECT TO PLAINTIFFS['] MOTION FOR PARTIAL SUMMARY JUDGMENT AS FINAL APPEALABLE ORDERS."

{¶16} The majority relies on the Supreme Court of Ohio's decision in *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, in support of its decision that the August 28, 2006 judgment entry was a final, appealable order. In that case, the court held that "[a] declaratory judgment action is a special proceeding pursuant to R.C. 2505.02 and, therefore, an order entered therein which affects a substantial right is a final appealable order." *Id.* at paragraph two of syllabus. The majority concludes that the determination of coverage affects a substantial right.

{¶17} In my view, the *General Acc.* case is distinguishable from this case. Here, the Walburns' complaint does not specifically seek relief pursuant to the declaratory judgment statute. Instead, the Walburns' complaint seeks UM/UIM coverage, i.e., damages, in a common-law action on a contract. Although the determination of coverage is necessary in determining whether the Walburns are

entitled to recovery from National Union, the Walburns' complaint goes beyond that by seeking the insurance proceeds.

{¶18} Further, in *General Acc.*, the court held that “the *duty to defend* involves a substantial right to both the insured and the insurer.” (Emphasis added.) *Id.* at 22. The court did not find that the determination of whether coverage exists, absent any determination of actual damages, affects a substantial right to both the insured and the insurer. To the contrary, the Tenth Appellate District holds that it does not. See *Tinker v. Oldaker*, Franklin App. No. 03-AP-671, 03AP-1036, 2004-Ohio-3316, ¶14 (finding that even if the court were to assume that the summary judgment decision was rendered in a special proceeding, the failure to determine damages when requested in a coverage action “does not ‘affect’ a substantial right[.]” and thus, is not a final appealable order); see, also, *Nungester v. Transcontinental Ins. Co.*, Ross App. Nos. 03CA2744, 03CA2749, 2004-Ohio-3857, ¶15 (Harsha, J., concurring) (stating where a complaint seeks a declaratory judgment on the issue of coverage as well as damages, an order granting summary judgment on the declaratory judgment aspect of the complaint without awarding damages is not a “final appealable order despite the Civ.R. 54(B) language”). In fact, this court has continuously held that “[a] determination of liability without a determination of damages is not a final appealable order because damages are part of a claim for relief, rather than a separate claim in and of themselves.” *Shelton v. Eagles Foe Aerie 2232* (Feb. 15, 2000), Adams App. No. 99CA678, citing *Horner v. Toledo Hospital* (1993), 94 Ohio App.3d 282.

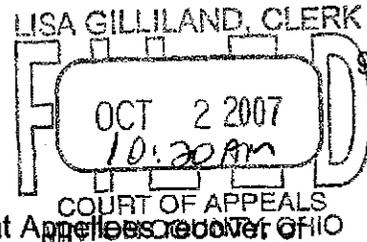
{¶19} Therefore, where damages are sought under a UM/UIM policy, a trial court's grant of summary judgment in favor of the insured and against the insurer on the

issue of coverage, but without any determination of damages, "is not a final appealable order and we lack jurisdiction[.]" Id.

{¶20} Consequently, I would find that the August 28 judgment is not a final, appealable order despite the Civ.R. 54(B) language. With this finding, I would then proceed with the analysis and determine if the December 12 judgment is a final, appealable order.

{¶21} Accordingly, I dissent.

Vinton App. No. 06CA655



JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED and that Appellant's costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

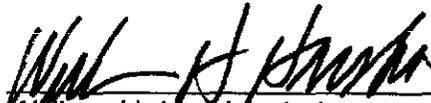
It is ordered that a special mandate issue out of this Court directing the Vinton County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J.: Concurs in Judgment and Opinion.
Kline, J.: Dissents with Attached Dissenting Opinion.

For the Court

BY: 
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.