

07-2302

Case No. _____

IN THE SUPREME COURT OF OHIO

STYRK WALBURN, *et al.*,)
)
 Plaintiffs-Appellees,)
)
 v.)
)
 WENDY SUE DUNLAP, *et al.*,)
)
 Defendants,)
)
 and)
)
 NATIONAL UNION FIRE INSURANCE)
 COMPANY OF PITTSBURGH,)
 PENNSYLVANIA)
)
 Defendant-Appellant.)

On Appeal from the Vinton County Court of Appeals, Fourth Appellate District No. 06 CA 655

Related Appeals to the Supreme Court of Ohio Nos. 2007-2140 & 2007-2150

FILED
DEC 12 2007
CLERK OF COURT
SUPREME COURT OF OHIO

**DEFENDANT-APPELLANT NATIONAL UNION FIRE INSURANCE
 COMPANY OF PITTSBURGH, PENNSYLVANIA'S
 NOTICE OF CERTIFIED CONFLICT**

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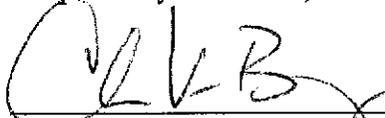
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NOTICE OF CERTIFIED CONFLICT

Pursuant to Supreme Court of Ohio Rule of Practice IV, Section 1, Defendant Appellant National Union Fire Insurance Company of Pittsburgh, PA (“National Union”) hereby gives notice that on December 3, 2007, the Court of Appeals, Fourth Appellate District granted National Union’s Motion to Certify Conflict (App. A), finding that its decision in *Walburn v. Dunlap*, 4th Dist. No. 06-CA655, 2007-Ohio-5398 (App. B) is in conflict with the Second District’s decision in *Beheshtaein v. American State Ins. Co.*, 2nd App. Dist. No. 20839, 2005-Ohio-5907 (App. C), the Ninth District’s decision in *Walter v. Allstate Ins. Co.*, 9th App. Dist. No. 21032, 2002-Ohio-5775 (App. D), and the Tenth District’s decision in *Tinker v. Oldaker*, 10th App. Dist. Nos. 03AP-671, 03AP-1036, 2004-Ohio-3316 (App. E). Accordingly, National Union respectfully requests that the Court consolidate the Certified Conflict with National Union’s two pending discretionary appeals, Supreme Court Case Nos. 2007-2140 and 2007-2150, pursuant to Supreme Court Practice Rule IV, Section 4(C), and allow these appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The foregoing was served on the following by regular U.S. Mail, postage prepaid,

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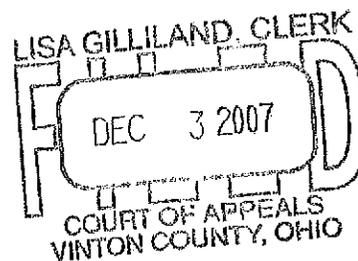
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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
VINTON COUNTY



Styrk Walburn, et al., :
 :
Plaintiffs-Appellees, : Case No. 06CA655
 :
v. :
 :
Wendy Sue Dunlap, et al., :
 :
Defendants, :
 :
and : ENTRY ON MOTION
 : TO CERTIFY CONFLICT
 :
National Union Fire Insurance :
Company of Pittsburgh, PA., :
 :
Defendant-Appellant. :

APPEARANCES:

Steven G. Janik, and Christopher Van Blargan, JANIK & DORMAN, L.L.P., Cleveland, Ohio, for Appellant.

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

Harsha, J.

Appellant, National Union Fire Insurance of Pittsburgh, PA, ("National Union"), has filed a motion to certify the record of this case to the Supreme Court of Ohio for review and final determination under App.R. 25. National Union contends that our decision and judgment entry in *Walburn v. Dunlap*, Vinton App. No. 06CA655, 2007-Ohio-5398, conflicts with the Second, Tenth, and Ninth Districts' decisions in *Baheshtaein v. American State Ins. Co.*, Montgomery App. No. 20839, 2005-Ohio-5907, *Tinker v. Oldaker*, Franklin App. Nos. 03AP-671 & 03AP-1036, 2004-Ohio-3316,

and *Walter v. Allstate Ins. Co.*, Summit App. No. 21032, 2002-Ohio-5775, on the following issue: In a declaratory judgment action, whether a trial court's certification of a judgment entry under Civ.R. 54(B) renders it a final appealable order when the court finds that an insured is entitled to coverage under an insurance policy, but does not resolve the issue of damages.

Article IV, Section 3(B)(4) of the Ohio Constitution provides:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals in the state, the judges shall certify the record of the case to the supreme court for review and final determination.

Before we can certify a judgment to the Supreme Court for review and final determination under Article IV, Section 3(B)(4), three conditions must exist:

1. The certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be upon the same question;
2. The alleged conflict must be on a rule of law - not facts; and
3. The journal entry or opinion of the certifying court must clearly set forth the rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Whitelock v. Gilbane Bldg. Co., 66 Ohio St.3d 594, 596, 1993-Ohio-223, 613 N.E.2d 1032.

In *Walter*, the Ninth District held that when a trial court makes a determination on liability but does not address damages, it is not a final appealable order. The Tenth and

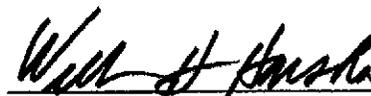
Second Districts followed this holding in *Tinker* and *Beheshtaein* respectively, with the court in *Tinker* additionally noting that the inclusion of the no just cause for delay language, under Civ.R. 54(B), is not what makes an order final and appealable. The order must be final as determined under R.C. 2505.02. In *Walburn*, we dismissed National Union's appeal of the trial court's December 12, 2006 judgment and held that the trial court's August 28, 2006 entry terminated the action relating to Nation Union because it arose in a special proceeding, the finding of coverage affected a substantial right, and it became appealable by its no just cause for delay language under Civ.R. 54(B). Thus, we ultimately concluded the trial court lacked jurisdiction to vacate its August 28, 2006 judgment.

Upon review, we find that the decision in this case conflicts with those of other appellate districts and **GRANT** National Union's motion to certify this issue to the Supreme Court of Ohio for review and final determination on the following question: In a case involving multiple claims, is a judgment in the declaratory judgment action a final appealable order when the trial court finds that an insured is entitled to coverage, includes a Civ.R. 54(B) certification, but does not address the issue of damages?

MOTION GRANTED.

McFarland, P.J. & Kline, J.: Concur.

FOR THE COURT



William H. Harsha, Judge

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

Styrk Walburn, et al., :
 :
 Plaintiffs-Appellees, : Case No. 06CA655
 :
 v. :
 :
 Wendy Sue Dunlap, et al., :
 :
 Defendants, :
 :
 and : DECISION AND JUDGMENT ENTRY
 : OF DISMISSAL
 National Union Fire Insurance :
 Company of Pittsburgh, PA., :
 : **Released 10/2/07**
 Defendant-Appellant. :
 :

APPEARANCES:

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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.

{¶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.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED and that Appellees recover of Appellant 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.

[Cite as *Beheshtaein v. Am. States Ins. Co.*, 2005-Ohio-5907.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

PARVIN BEHESHTAEIN, ET AL. :

Plaintiffs-Appellants : C.A. Case No. 20839

vs. : T.C. Case No. 00-CV-5986

AMERICAN STATES INS. CO., : (Civil Appeal from Common
ET AL. : Pleas Court)

Defendants-Appellees :

.....

OPINION

Rendered on the 4th day of November, 2005.

.....

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.....

FAIN, J.

{¶ 1} Plaintiffs-appellants Alee and Ameen Beheshtaein, hereinafter referred to as the Beheshtaein children, appeal from a summary judgment rendered against them upon their claims against Gulf Insurance Company. The Beheshtaein

children contend that the trial court was not free to reconsider a summary judgment that had previously been rendered in their favor on the issue of insurance coverage, because, although other insurance company defendants successfully appealed from the trial court's dispositions of claims against them, Gulf did not appeal. They further contend that the law-of-the-case doctrine precluded the trial court from revisiting the issue of Gulf's insurance coverage.

{¶ 2} We agree with the trial court that the summary judgment it rendered in favor of the Beheshtaein children on the issue of insurance coverage remained interlocutory because other issues involving their claim against Gulf – issues involving damages and priority of coverage – had not yet been resolved. Thus, the summary judgment was not a final order adjudicating the Beheshtaein children's claim against Gulf, and was subject to reconsideration and revision. The doctrine of the law of the case has been expressly held to be inapplicable to cases not yet fully adjudicated that involve the application of *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 797 N.E.2d 1256. *Hopkins v. Dyer* (2004), 104 Ohio St.3d 461, 820 N.E.2d 329. Consequently, the judgment of the trial court is Affirmed.

I

{¶ 3} On Christmas Eve, 1997, the Beheshtaein family was involved in a car accident while driving through Pennsylvania to visit relatives. The accident paralyzed Mrs. Beheshtaein. The Beheshtaeins contend that the accident was caused by the negligence of another motorist who ran them off the road, did not stop, and was never identified. Mrs. Beheshtaein claims to have been employed by

the City of Dayton at the time of the accident. The City of Dayton was then insured by TIG Insurance Company, Old Republic Insurance Company, Lloyd's of London, and Monroe Guarantee Insurance Company. Mr. Beheshtaein was employed by the Dayton Board of Education, which was insured by American States Insurance Company and Gulf Insurance Company.

{¶ 4} The Beheshtaeins, including the Beheshtaein children, brought this action against all of the above-named insurance companies, and two additional insurance companies, claiming that they were insureds entitled to uninsured motorists coverage for their damages resulting from the accident. The trial court rendered summary judgments concluding that Mrs. Beheshtaein was an insured under the American States, TIG, Old Republic, Lloyd's and Gulf policies, pursuant to *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116. The claims against the other insurance companies had already been resolved.

{¶ 5} Although the trial court found that Mrs. Beheshtaein was an insured under the policies of Gulf and the other four insurance companies remaining in the action, it found that she was nevertheless not entitled to coverage because she lacked independent corroborative evidence that a "hit-and-run" driver had caused the accident. As to the Beheshtaein children, on the other hand, the trial court found that they could maintain their derivative claims because Mr. Beheshtaein's testimony was sufficient corroboration for their claims. The trial court specifically reserved the issues of priority and damages with respect to the claims of the Beheshtaein children against Gulf and the other four insurance companies, but

entered certification, under Civ. R. 54(B), that there was no just reason for delay with respect to the claims of Mr. and Mrs. Beheshtaein, which had been completely adjudicated.

{¶ 6} Although the other four insurance companies appealed from the trial court's summary judgment rulings, and Mr. and Mrs. Beheshtaein cross-appealed, Gulf did not appeal. In that appeal, to which Gulf was not a party, we held that neither Mr. nor Mrs. Beheshtaein was an insured under the other four insurance companies' policies, relying upon *Westfield Ins. Co. v. Galatis*, supra. Likewise, because their claims were derivative through their parents, the Beheshtaein children were not insured under those policies. *Beheshtaein v. American States Ins. Co.*, Montgomery App. Nos. 19863, 19864, 19867, 19874 and 19875, 2004-Ohio-2316.

{¶ 7} Following our decision in the appeal to which it was not a party, the trial court requested briefs from the parties concerning the claims of the Beheshtaein children against Gulf. Gulf moved for judgment in its favor, relying upon *Galatis*. The trial court agreed with Gulf, and rendered judgment in its favor. From that judgment, the Beheshtaein children appeal.

II

{¶ 8} The Beheshtaein children's First Assignment of Error is as follows:

{¶ 9} "THE TRIAL COURT ERRED IN DETERMINING THAT THE APPELLATE COURT'S RULING IN FAVOR OF THE APPEALING PARTIES IN CASE NOS. 19863, 19864, 19867, 19874 AND 19875 APPLIES TO GULF, A

NON-APPEALING PARTY.”

{¶ 10} Although we agree with this proposition of law in its narrowest sense, that does not affect the outcome. What the Beheshtaein children are really arguing is that the summary judgment in their favor was a final judgment, not appealed, that could not be reconsidered and revised by the trial court. We disagree.

{¶ 11} The summary judgment rendered with respect to the claim of the Beheshtaein children against Gulf did not finally adjudicate or otherwise resolve their claim against Gulf. As the trial court noted in the judgment from which this appeal is taken, it had expressly reserved the issues of damages and priority of insurance coverage. The damages issue, at least, is not a distinct claim that may be severed from other claims pursuant to Civ. R. 54(B). That rule applies in cases involving multiple claims for relief, and provides that “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.” Thus, the trial court’s determination did, in fact, result in the claims of Mr. and Mrs. Beheshtaein against Gulf and the other insurance companies becoming the subject of a final judgment in favor of each insurance company, respectively, because each of those claims for relief had been fully adjudicated. The claims of the Beheshtaein children, by contrast, were the claims for relief that had not been fully adjudicated.

{¶ 12} (This leads to the conundrum that this court’s purported disposition with respect to those claims – the claims of the Beheshtaein children against the other four insurance companies – is likely a nullity, because this court lacked jurisdiction over those claims, for want of a final appealable order. This is of

academic interest, only, since the logical result is that those claims, as well, remain interlocutory, subject to revision in the trial court, which would presumably apply the *Galatis* decision and reach the same result with respect to those claims.)

{¶ 13} Because the summary judgments in favor of the Beheshtaein children, against Gulf, being only partial summary judgments on the issue of insurance coverage, remained interlocutory and subject to revision, the trial court did not err in reconsidering them.

{¶ 14} As the Beheshtaein children's First Assignment of Error is framed, it challenges the propriety of the trial court's having considered itself bound by this court's decision in *Beheshtaein v. American States Ins. Co.*, Montgomery App. Nos. 19863, 19864, 19867, 19874 and 19875, 2004-Ohio-2316, the appeal to which Gulf was not a party. From our reading of the trial court's decision, this was at most an alternative ground

{¶ 15} for the trial court's holding, it having already decided that *Galatis* applied, and that *Galatis* required it to determine that neither the Beheshtaeins, nor their children, were insured under the Gulf policy. Thus, even if the trial court erred in considering itself bound by this court's decision in the appeal to which Gulf was not a party, that error was harmless.

{¶ 16} The Beheshtaein children's First Assignment of Error is overruled.

III

{¶ 17} The Beheshtaein children's Second Assignment of Error is as follows:

{¶ 18} "THE TRIAL COURT ERRED IN RECONSIDERING ITS PRIOR

DECISION IN THAT THE LAW OF THE CASE DOCTRINE PRECLUDES GULF FROM RELYING ON ARGUMENTS WHICH COULD HAVE BEEN PURSUED ON THE FIRST APPEAL.”

{¶ 19} This assignment of error is overruled on the authority of *Hopkins v. Dyer* (2004), 104 Ohio St.3d 461, 820 N.E.2d 329, in which the Ohio Supreme Court has unequivocally held that the law-of-the-case doctrine does not apply to a cause of action involving the application of *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, supra, not yet finally adjudicated when *Westfield Ins. Co. v. Galatis*, supra, was decided.

IV

{¶ 20} Both of the Beheshtaein children's assignments of error having been overruled, the judgment of the trial court is Affirmed.

.....

DONOVAN, and YOUNG, JJ., concur.

(Hon. Frederick N. Young, Retired from the Court of Appeals, Second Appellate District, Sitting by Assignment of the Chief Justice of the Supreme Court of Ohio)

Copies mailed to:

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- Hon. Michael Hall

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

MARY C. WALTER, et al.
Appellee

v.

ALLSTATE INSURANCE CO., et al
Appellee

CA. No. 21032

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 01 02 0658
CONTINENTAL CASUALTY CO.
Appellant

DECISION AND JOURNAL ENTRY

Dated: October 23, 2002

This cause was heard upon the record in the trial court and the following disposition is made:

CARR, Judge.

{¶1} Appellant, Continental Casualty Company (“Continental”), has appealed the decision of the Summit County Court of Common Pleas, which

denied its motion for summary judgment. For the reasons that follow, this Court dismisses the appeal for lack of a final, appealable order.

I.

{¶2} On February 9, 2001, appellees, Mary and Richard Walter, filed a complaint against Allstate Insurance Company (“Allstate”) concerning automobile coverage for a collision Mary was involved in on June 6, 2000. Mary was driving a 1998 Toyota Avalon, the Walters’ personal automobile, when she was hit by Karla Graebner in Nagshead, North Carolina. Karla paid the Walters \$50,000 to settle the claim, this amount being the limit of her liability insurance policy with Geico. The Walters’ Toyota was insured by a personal automobile policy issued by Allstate. That policy was issued directly to the Walters and had UM/UIM coverage in the amount of \$100,000 per person and \$300,000 per accident. The Walters also carried a business automobile policy with Continental.

{¶3} On March 15, 2001, the Walters amended their complaint against Allstate to include a claim against Continental. The Walters alleged that they were entitled to underinsured motorist benefits under both policies. On October 17, 2001, Continental filed a motion for summary judgment, claiming that the Walters were not entitled to coverage under the Continental policy. On November 2, 2001, the Walters filed a reply and cross-motion for summary judgment against Continental. In their reply, the Walters requested a court order declaring that they

were entitled to not only coverage under the Continental business automobile policy, but also coverage under a Continental commercial umbrella policy.

{¶4} On November 29, 2001, Continental filed a brief in opposition to the Walters' reply and cross-motion for summary judgment. Continental reasserted that the Walters were not entitled to coverage under the Continental policy, and that the commercial umbrella policy was issued by Transportation Insurance Company ("Transportation"), not Continental. On January 15, 2002, Allstate filed a response to Continental's motion for summary judgment, and its own cross-motion for summary judgment. Allstate argued that it provided for \$100,000 in underinsured benefits, Continental provided for \$1,000,000 in underinsured benefits, and therefore the parties should share the loss on a pro rata basis. Allstate requested that it be responsible for 1/11th of the loss and that Continental be responsible for 10/11th of the loss.

{¶5} On January 30, 2002, Continental filed a motion to strike Allstate's response due to its untimeliness, as well as Allstate's cross-motion for summary judgment. On February 1, 2002, the Walters moved the court for leave to file a second amended complaint to include Transportation as a party, which the court granted that same day. On February 14, 2002, Transportation and Continental filed a joint answer to the Walters' second amended complaint.

{¶6} On March 11, 2002, the trial court entered an order addressing all the parties' summary judgment motions. The court granted summary judgment to

both the Walters and Allstate, and it denied summary judgment to Continental. It found that Allstate and Continental owed underinsured coverage to the Walters, that the coverage should be shared between them on a pro rata basis, and that Allstate was liable for 1/11th of the Walters' total damages and Continental was liable for 10/11th of the Walters' total damages. Although the trial court determined liability in its judgment entry, no money damages amount was determined for the Walters against Allstate and Continental.

{¶7} Continental timely appealed and its appeal is now before this Court.

II.

{¶8} Before reaching the merits of the appeal, this Court must determine whether it has jurisdiction to review the order from which Continental appeals. Section 3(B)(2), Article IV of the Ohio Constitution limits this court's appellate jurisdiction to the review of final judgments of lower courts. For a judgment to be final and appealable, it must satisfy the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 88.

{¶9} To be final, an order must fit into one of the categories set forth in R.C. 2505.02. See *General Electric Supply Co. v. Warden Electric, Inc.* (1988), 38 Ohio St.3d 378, 380. R.C. 2505.02(B)(1) provides that an order "that affects a substantial right in an action that in effect determines the action and prevents a judgment" is final and appealable.

{¶10} The order appealed by Continental, that determined the issue of liability but not damages, is not final under R.C. 2505.02. In *State ex rel. White v. Cuyahoga Metro. Hous. Auth.* (1997), 79 Ohio St.3d 543, 546, the Ohio Supreme Court acknowledged the general rule that, “orders determining liability in the plaintiffs’ *** favor and deferring the issue of damages are not final appealable orders under R.C. 2505.02 because they *do not determine the action or prevent a judgment.*” (Emphasis added.) Appellate courts, including this one, have held that summary judgment on the issue of liability alone, with an award of damages left for future determination, does not constitute a final appealable order as contemplated by R.C. 2505.02. See, e.g., *Summit Petroleum, Inc. v. K.S.T. Oil & Gas Co., Inc.* (1990), 69 Ohio App.3d 468, 470; *Mayfred Co. v. Bedford Hts.* (1980), 70 Ohio App.2d 1, 3.

{¶11} As Continental has appealed from a non-final order, this Court lacks jurisdiction to hear the appeal. The appeal is therefore dismissed.

Appeal dismissed.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
BATCHELDER, J.
CONCUR

APPEARANCES:

THOMAS J. CABRAL and KENNETH W. McCAIN, Attorneys at Law, Seventh Floor, Bulkley Building, 1501 Euclid Avenue, Cleveland, Ohio 44115 for Appellant.

RICHARD E. DOBBINS and NICHOLAS SWYRYDENKO, Attorneys at Law, Suite 105, 1000 S. Cleveland-Massillon Rd., Akron, Ohio 44333 , for Appellee.

DAVID L. SIMS, Attorney at Law, 50 South Main Street, Suite 620, Akron, Ohio 44308-1861 for Appellee.

[Cite as *Tinker v. Oldaker*, 2004-Ohio-3316.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Robert Tinker et al.,	:	
	:	
Plaintiffs-Appellees,	:	
	:	
v.	:	No. 03AP-671
	:	and No. 03AP-1036
Christy L. Oldaker et al.,	:	(C.P.C. No. 00CVC09-8291)
	:	
Defendants-Appellees,	:	
	:	(REGULAR CALENDAR)
(National Union Fire Insurance	:	
Company of Pittsburgh, PA,	:	
	:	
Defendant-Appellant).	:	
	:	

O P I N I O N

Rendered on June 24, 2004

Tyack, Blackmore & Liston, Co., L.P.A., and Jonathan T. Tyack, for plaintiff-appellees.

Janik & Dorman, L.L.P., Steven G. Janik, Matthew J. Grimm, and Jonathan W. Philipp, for defendant-appellant National Union Fire Insurance Company of Pittsburgh, PA.

Wiles, Boyle, Burkholder & Bringardner Co., L.P.A., Michael L. Close, Dale D. Cook and Samuel M. Pipino, Co-counsel for defendant-appellant, National Union Fire Insurance Company of Pittsburgh, PA.

David J. Heinlein, for defendant-appellee, The Cincinnati Insurance Company.

APPEALS from the Franklin County Common Pleas Court.
WATSON, J.

{¶1} Defendant, National Union Fire and Insurance Company of Pittsburgh, PA ("National Union"), appeals from the judgment of the Franklin County Court of Common Pleas granting plaintiffs' motion for summary judgment and finding them to be insureds under its policy, and denying its motion to compel arbitration. For the following reasons, the judgment is dismissed and remanded in part and affirmed in part.

{¶2} On September 28, 1998, plaintiffs, Christy and Robert Tinker, suffered injuries in an accident when they collided with a vehicle operated by defendant Christy Oldaker ("Oldaker"). Oldaker was insured by Mid Century Insurance Company ("Mid Century") with limits of \$100,000 per person and \$300,000 per accident. Plaintiffs settled with Mid Century and Oldaker was dismissed as a defendant.

{¶3} Mrs. Tinker was employed by Ohio Gastroenterology Group, Inc., which was insured by Cincinnati Insurance Company ("CIC") for commercial automobile liability. CIC's policy limit was \$1,000,000 with umbrella limits of \$1,000,000 in excess of \$1,000,000. Mr. Tinker was employed by ABB Automation, Inc. ("ABB"), which was insured by National Union for commercial automobile liability having liability limits of \$5,000,000 and uninsured/underinsured motorists ("UM/UIM") coverage in the amount of \$25,000 per person and \$50,000 per accident. Plaintiffs sued ABB but not National Union.

{¶4} On August 16, 2001, CIC filed a motion for summary judgment. On December 17, 2001, the trial court held Mrs. Tinker was insured under the CIC policy entitled to \$1,000,000 UM/UIM coverage. On November 28, 2001, plaintiffs and CIC filed

an agreed motion to compel joinder of National Union. On January 4, 2002, the trial court ordered National Union be joined as a party. On August 6, 2002, National Union filed a motion for summary judgment. The trial court held Mr. Tinker was entitled to UM/UIM coverage under National Union's policy.

{¶5} On September 20, 2002, CIC filed a motion for reconsideration of the trial court's decision finding Mrs. Tinker an insured under its policy for purposes of UM/UIM. On November 19, 2002, the trial court reversed its decision and held that both plaintiffs were insureds under National Union's policy entitled to UM/UIM coverage. The trial court further held the CIC policy provided excess coverage to National Union's policy. On December 2, 2002, the day trial was supposed to begin, National Union filed a motion to compel arbitration under the policy's Ohio Uninsured Motorists Coverage – Bodily Injury Endorsement ("UM/UIM endorsement"). The UM/UIM endorsement contains the following language:

ARBITRATION

a. If we and an "insured" disagree whether the "insured" is legally entitled to recover damages from the owner or driver of an "uninsured motor vehicle" or do not agree as to the amount of damages that are recoverable by that "insured", then the matter may be arbitrated. However, disputes concerning coverage under this endorsement may not be arbitrated. Either party may make a written demand for arbitration. * * *

{¶6} The trial was continued and National Union withdrew its motion to attempt settlement. No settlement was reached. The case was again set for trial March 31, 2003. National Union renewed its motion to compel arbitration. Ultimately, the trial court denied the motion. The trial court held National Union waived its right to arbitration by waiting until the day trial was to commence, participating in discovery, depositions, and

settlement discussions. Two appeals were filed by National Union, 03AP-1036 dealing with the insurance coverage issues, and 03AP-671 dealing with the denial of its motion to compel arbitration and stay proceedings. Those appeals were consolidated and are addressed together in this opinion.

{¶7} National Union asserts the following assignments of error¹ in Case No. 03AP-1036:

[1.] The Trial Court erred in granting Tinker's Motion for Summary Judgment and denying National Union's Motion for Summary Judgment since Tinker was not in the course and scope of his employment with ABB at the time of the accident.

[2.] The Trial Court erred in granting Tinker's Motion for Summary Judgment and denying National Union's Motion for Summary Judgment since ABB was self-insured.

[3.] The Trial Court erred in granting Tinker's Motion for Summary Judgment and denying National Union's motion for summary judgment since ABB selected a lower UM/UIM limit.

[4.] The Trial Court erred in granting Cincinnati Insurance's Motion for Reconsideration since any coverage provided by National Union is excess.

{¶8} National Union's sole assignment of error in Case No. 03AP-671:

[1.] Whether the trial court erred and committed reversible error as a matter of law when it denied the motion to compel arbitration and dismiss plaintiffs' claims, or in the alternative, to stay proceedings pending arbitration of defendant-appellant [National Union].

{¶9} Subsequent to the trial court proceedings, the Supreme Court of Ohio decided *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849. *Galatis* limited the application of *Scott-Pontzer* and held the following:

¹ CIC apparently tried to file an appellate brief; however, the brief was stricken as CIC failed to file a notice of appeal after the court allowed them to do so.

2. Absent specific language to the contrary, a policy of insurance that names a corporation as an insured for uninsured or underinsured motorist coverage covers a loss sustained by an employee of the corporation only if the loss occurs within the course and scope of employment. * * *

3. Where a policy of insurance designates a corporation as a named insured, the designation of "family members" of the named insured as other insureds does not extend insurance coverage to a family member of an employee of the corporation, unless that employee is also a named insured.

Galatis, at ¶ 2 and 3 of the syllabus. (Citations omitted.)

{¶10} This court has applied *Galatis* retrospectively to pending cases. *Burt v. Harris*, Franklin App. No. 03AP-194, 2004-Ohio-756. The court limited the application of *Scott-Pontzer* to an employee who had an accident while he or she was within the course and scope of their employment. *Id.* The court also overruled *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* (1999), 86 Ohio St.3d 557. The court limited recovery to family members who were actually *named* insureds. *Id.*

{¶11} Initially, we must address whether a final appealable order exists in this case. This court's jurisdiction is limited to the review of judgments or final orders of trial courts. *Jackson v. City of Columbus*, 156 Ohio App.3d 114, 2004-Ohio-546. 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. *Burt*, *supra*, citing *Chef Italiano Corp. v. Kent State Univ.*, (1989), 44 Ohio St.3d 86, syllabus. 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." *Burt*, supra, citing *General Acc. Ins. Co. v. Ins. Co. of North America* (1989), 44 Ohio St.3d 17, 22.

{¶12} Here, the amended complaint arguably seeks, in part, a declaration that Mr. and Mrs. Tinker were insureds under the respective policies.² 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.

{¶13} 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. *Jackson*, supra; *Kemerer v. Antwerp Bd. of Ed.* (Jan. 12, 1994), Paulding App. No. 11-93-3. The order appealed from must be final as defined by R.C. 2505.02. *Id.*, quoting *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352, 354 (stating the determination of whether an order is final is a two step process; in the first step the reviewing court should focus on whether the order sought to be appealed from affects a substantial right and whether it in effect determines an action and prevents a judgment).

² Although it is questionable whether the amended complaint in this case seeks a declaratory judgment regarding whether appellees are insureds under the applicable policies, as opposed to merely an action for damages, we give appellees the benefit of the doubt and construe the complaint as seeking declaratory relief. If it were simply an action for damages, there would clearly be no final appealable order.

"An order that affects a substantial right is 'one which, if not immediately appealable, would foreclose appropriate relief in the future.'" *Burt*, supra.

{¶14} 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. *Id.* 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.

{¶15} As a sidenote, appellee attempted to avoid the application of *Galatis* by filing a notice of voluntary termination in the trial court. Appellees' attempt must fail. It is well established that once an appeal has been perfected the trial court loses jurisdiction over the matter, except for collateral matters, pending the outcome on appeal. *Bryant Health Center, Inc. v. Ohio Dept. of Job and Family Services*, Franklin App. No. 03AP-482, 2004-Ohio-545. *Vavrina v. Greczanik* (1974), 40 Ohio App.2d 129, 132 ("If after entering a final judgment, a timely notice of appeal is filed the trial court does not have authority to act during the pendency of the appeal").

{¶16} In this case, National Union filed its notice of appeal on October 17, 2003, including an appeal of the trial court's denial of arbitration. The appeals were consolidated. National Union filed its appellate brief on December 8, 2003. On December 24, 2003, after National Union's brief was filed and after the *Galatis* decision

was rendered, appellee filed its notice of case termination in the trial court, citing Civ.R. 41(A). Therefore, it is clear that National Union's notice of appeal was filed well before appellee's notice of case termination.³ This is true even though we have determined the order appealed from is not yet final and appealable.

{¶17} Based on the above, we find the trial court's decision granting appellees' motion for summary judgment was not a final appealable order. Therefore, the appeal is dismissed and remanded to the trial court for further proceedings in accordance with law. On remand we note that *Galatis* will likely dispose of the claims so long as there is evidence that Mr. Tinker was not acting in the course and scope of employment at the time of the accident.⁴

{¶18} In case number 03AP-671, National Union contends the trial court erred in denying its motion to compel arbitration and stay the proceedings. We disagree. The standard of review for a decision denying a motion to compel arbitration and stay proceedings is whether the trial court abused its discretion. *Atkinson v. Dick Masheter Leasing II, Inc.*, Franklin App. No. 01AP-1016, 2002-Ohio-4299. Abuse of discretion connotes more than an error of law or judgment. *Id.* It implies that the court acted arbitrarily, unreasonably, or unconscionably. *Id.* Arbitration is encouraged as a method to settle disputes and a presumption arises when the claim in dispute falls within the

³ As an additional sidenote, it is interesting that plaintiffs-appellees made a joint motion with defendants to the trial court asking for Civ.R. 54(B) language so that the parties could appeal. By attempting to dismiss under Civ.R. 41(A) in the trial court, plaintiffs-appellees attempt to circumvent their own motion.

⁴ After reviewing the record, it is undisputed that Mrs. Tinker was not in the course and scope of employment. As noted earlier, the trial court found the CIC policy provided only excess coverage and found Mrs. Tinker to be an insured under National Union's policy based on the fact that she was Mr. Tinker's spouse, e.g., a family member. Therefore, whether Mrs. Tinker was in the course and scope of employment appears to be a non-issue.

scope of the arbitration provision. *Battle v. Bill Swad Chevrolet, Inc.* (2000), 140 Ohio App.3d 185, 188, citing *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 471. The right to arbitrate, like any other contractual right, may be waived. *Rock v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1992), 79 Ohio App.3d 126, 128. Due to Ohio's strong policy favoring arbitration, the party asserting a waiver has the burden of proving it. *Atkinson, supra.*

{¶19} A party asserting waiver must establish that (1) the waiving party knew of the existing right to arbitrate; and (2) the totality of the circumstances demonstrate the party acted inconsistently with the known right. *Id.*

{¶20} In looking at the totality of circumstances, courts consider the following factors: (1) whether the party seeking arbitration invoked the jurisdiction of the court by filing a complaint, counterclaim, or third-party complaint without asking for a stay of the proceedings; (2) the delay, if any, by the party seeking arbitration to request a stay of the judicial proceedings, or an order compelling arbitration; (3) the extent to which the party seeking arbitration has participated in the litigation, including a determination of the status of discovery, dispositive motions, and the trial date; and (4) whether the nonmoving party would be prejudiced by the moving party's prior inconsistent actions. *Baker-Henning Productions, Inc. v. Jaffe* (Nov. 7, 2000), Franklin App. No. 00AP-36.

{¶21} Waiver attaches where there is active participation in a lawsuit evincing an acquiescence to proceeding in a judicial forum. *Atkinson, supra; Griffith v. Linton* (1998), 130 Ohio App.3d 746. For example, in *Griffith*, this court found that a motion for summary judgment seeking to declare a tortfeasor negligent constituted an election to proceed with litigation as opposed to arbitration. *Id.*

{¶22} In the case at bar, National Union did not invoke the jurisdiction of the court without seeking to compel arbitration. However, National Union was joined as an indispensable party in January 2002. National Union wrote the policy at issue and knew of its right to arbitrate. The trial court found National Union acted inconsistently with its known right by not filing a motion to compel arbitration at any time prior to December 2, 2002, the morning of trial. Upon National Union's motion for a continuance, the trial was continued to March 31, 2003. National Union withdrew its motion to compel. Again, only several days before trial was to commence, National Union refiled its motion to compel arbitration. Further, National Union participated in discovery, trial depositions, pretrials, and settlement discussions. The trial court found appellees had likewise been preparing for trial and would be prejudiced if it stayed the proceedings. Based on these circumstances, we find no abuse of discretion in denying National Union's motion to compel arbitration and stay the proceedings. Accordingly, National Union's sole assignment of error in case number 03AP-671 is overruled.

{¶23} Based on the foregoing, the order appealed from is not a final appealable order and the appeal is dismissed and remanded to the trial court. On remand, it is likely *Galatis* will be dispositive depending on the evidence regarding scope of employment. Further, appellees' attempt to voluntarily terminate the case is unavailing. The trial court is generally divested of jurisdiction on all but collateral matters as soon as an appeal is perfected. Finally, the trial court did not abuse its discretion in denying National Union's motion to compel arbitration.

{¶24} Accordingly, National Union's appeal in case number 03AP-1036 is dismissed and remanded to the Franklin County Court of Common Pleas for further

proceedings. National Union's sole assignment of error in case number 03AP-671 is overruled.

Appeal dismissed and remanded in Case No. 03AP-1036;
and judgment affirmed in Case No. 03AP-671.

BOWMAN and BRYANT, JJ., concur.
