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I. EXPLANATION WHY CASE DOES NOT INVOLVE ISSUES OF PUBLIC OR GREAT GENERAL INTEREST

Appellant National Union Fire Insurance Company of Pittsburgh, PA (“National Union”) presents no compelling reason why this Court should undertake review of the Fourth District Court of Appeals’ decision in this matter. In order for this Court to certify the record in this matter, the issues raised by National Union must be of public or great interest or involve a substantial constitutional question. Noble v. Caldwell (1989), 44 Ohio St.3d 92, 94, 540 N.E.2d 1381.

In this matter, National Union presents two arguments that the Fourth District Court (1) misinterpreted Ohio Law and (2) deprives litigants the ability to challenge an order, judgment, or decree of an appellate court under Civil Rule 60(B), thus raising a constitutional question.

None of National Union’s issues are ones of public or great general interest or involve a substantial constitutional question for this Court’s consideration. As such, this Court does not have jurisdiction to hear National Union’s appeal. Accordingly, Appellees Betty and Styrk Walburn (“the Walburns”) request this Court decline jurisdiction over National Union’s appeal.

1. NATIONAL UNION PRESENTS NO ISSUE OF PUBLIC OR GREAT GENERAL INTEREST FOR THE COURT’S CONSIDERATION.

National Union has not presented any factual or legal issue of public or great general interest. At this stage of the appeal, the sole issue is whether this case presents questions of public or great general interest or presents questions that are primarily of interest to the parties. Williamson v. Rubich (1970), 171 Ohio St. 253, 254, 168 N.E.2d 876. Whether this case presents issues of public or great general interest rests within this Court’s discretion. Id. Issues of public or great general interest concern and affect the vast majority of Ohioans on an almost

daily basis and for long periods of time. For example, this Court held that constitutionality of the state system for funding public education rises to the level of a matter of public or great general interest, as this issue affects all current and future students and their parents and guardians on an almost daily basis from elementary school through high school. Derolph v. State of Ohio (1997), 78 Ohio St.3d 193, 677 N.E.2d 733. This Court also held that the extent of a local school board's authority to make rules and regulations is a matter of public or great general interest, as this issue also affects all current and future students and their parents and guardians on an almost daily basis from elementary school through high school. In re Appeal of Suspension of Huffer from Circleville High School (1989), 47 Ohio St.3d 12, 546 N.E.2d 1308. Among the other issues deemed by this Court to be of public or great general interest that affect the vast majority of Ohioans on an almost daily basis include the extent of a city's authority to use zoning regulations to preserve and protect the character of certain neighborhoods to promote the overall quality of life in the city. Franchise Developers, Inc. v. City of Cincinnati (1987), 30 Ohio St.3d 28, 505 N.E.2d 966.

Issues of public or great general interest can also concern laws and procedures that conflict with public policy. For example, the issue of whether a civil cause of action exists for perjured grand jury testimony presents an issue of public or great general interest, as subjecting someone to a civil cause of action may violate the public policy to protect those who testify before a grand jury. Kintz v. Harringer (1919), 99 Ohio St. 240, 243, 124 N.E. 168. Similarly, the question whether legislative concern over drunken driving is sufficient to evoke an intent for DUI convictions to bar expungement of any other conviction, regardless of whether the DUI and the other offense resulted from the same act, also presents a question of public or great general

interest. State of Ohio v. Sandlin (1999), 86 Ohio St.3d 165, 712 N.E.2d 740.

All of the above cases involve legal issues that, by their very nature, have the potential to affect a large number of Ohioans irrespective of the factual differences that may distinguish one citizen's case from another's case. In such circumstances, this Court's issuance of a decision that creates a clear and precise rule clarifies matters for citizens faced with a similar dispute and minimizes the waste of judicial resources as those citizens seek redress in the courts of this state. The same cannot be said the issues over which National Union is requesting that this Court exercise jurisdiction.

The issues presented by National Union do not affect the vast majority of Ohioans. This issue only presents itself when the exact scenario repeats itself. This scenario has very limited application and is very unlikely going to be seen again by this Court.

Certification of National Union's issues would be improper since it only involves their interests and are not issues of a public or great general interest or a substantial constitutional question. Therefore the Walburns respectfully request that this Court decline jurisdiction over National Union's appeal.

2. NATIONAL UNION PRESENTS NO SUBSTANTIAL CONSTITUTIONAL QUESTION FOR THIS COURT'S CONSIDERATION.

In an attempt to create a constitutional question, National Union alludes to a due process violation by alleging it did not have any way to address the Appellate Court's alleged mistake or error. This argument is totally illusory because National Union finds itself in this position due to **its actions** solely. National Union timely filed a Notice of Appeal and then dismissed its own appeal. At no time has National Union requested reconsideration under Appellate Rule 26(A) of

the Court of Appeals decision of October 4, 2006, let alone within ten days required for reconsideration.

National Union argues that its due process rights were violated because it cannot challenge an order, judgment, or decree of an appellate court obtained through mistake, error or fraud if not discovered prior to the expiration of the forty-five day appeals period, and this impairs a litigant's rights of procedural and substantive due process. [National Union's Memorandum in Support of Jurisdiction, page 1]. However, National Union did not present any due process violation arguments in the trial or appellate court. Since National Union did not raise the due process argument below, it has waived the argument. Shover v. Cordis Corp. (1991), 61 Ohio St.3d 213, 200, 574 N.E.2d 457 (citations omitted).

Further, due process is not a concern in the matter herein. Due process is a concern only when a governmental entity deprives, or attempts to deprive, one of life, liberty or property without an opportunity for a meaningful hearing before an impartial decision maker after proper notification. See Mullane v. Cent. Hanover Bank & Trust Co. (1950), 339 U.S. 306, 313-23 (discussing the notice requirement of due process); Goldberg v. Kelly (1970), 397 U.S. 254, 260-71 (discussing the hearing requirement of due process); Gibson v. Berryhill (1973), 411 U.S. 564, 575-79 (discussing the impartial decision maker requirement of due process). National Union was not deprived of life, liberty, or property. National Union does not claim that it lacked notice of any proceeding in the trial court. National Union does not claim there were no hearings before the issuance of the trial court's decisions. Finally, National Union does not claim that it did not have an impartial decision maker with respect to the decisions of the trial or appellate courts.

Moreover, a matter that raises the issue of whether an alleged constitutional violation has occurred with respect to a single individual or entity is not a matter that meets the substantial constitutional question; the constitutional violation must affect a vast majority of Ohioans. For example, whether an Ohio public school financing scheme violates Section 2, Article VI of the Ohio Constitution, which requires Ohio to provide and fund a system of public education and guarantee a thorough and efficient system of common schools throughout Ohio, is a substantial constitutional question, as well as an issue of public or great general interest. Derolph at 197-98. Since the issues presented by National Union only affect the outcome of its lawsuit with the Walburns, this is not a case that raises a substantial constitutional question. Therefore, it is improper for this Court to certify this matter.

As such, none of the issues presented by National Union for certification is an issue of public or great general interest or involves a substantial constitutional question. Accordingly, the Court does not have jurisdiction to hear National Union's appeal. Therefore, the Walburns respectfully request that this Court decline jurisdiction of National Union's appeal.

3. THIS CASE DOES NOT INVOLVE A CONFLICT IN APPELLATE COURT DECISIONS.

Recently the Court of Appeals of the Fourth Appellate District granted Appellant's Motion to Certify a Conflict. It is unfortunate that this fine Appellate Court has been misled by the Appellant, National Union, in failing to address the real issue in this matter. This same Appellate Court ultimately dismissed National Union's appeal as being untimely and therefore opined that they did not have jurisdiction to address National Union's appeal. That was the issue from which National Union is appealing, their dismissal of their appeal.

This is not an issue of conflicting decisions upon the issue of final appealable order, but one and only one of timeliness of appeals. One does not even reach the final appealable order issue until one perfects his standing in the appellate court, something that National Union did not do by all accounts.

II STATEMENT OF FACTS AND CASE

On January 22, 2003, the Walburns filed suit against Wendy Sue Dunlap ("Dunlap"), Ohio Mutual Insurance Company, National Union and The Cincinnati Insurance Company. In their Complaint, the Walburn's sought redress for an injury which Styrk Walburn suffered as a result of an automobile accident directly and proximately caused by Dunlap's negligence. The Walburns asserted that Dunlap was an "uninsured or underinsured motorist under Ohio law."

Other pertinent allegations of the Walburns included:

14. National Union issued a policy of insurance bearing policy number 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 the 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."

On August 28, 2006, the Trial Court granted the Walburn's Motion for Partial Summary Judgment, finding that the Walburns were entitled to UM/UIIM coverage under the commercial automobile and umbrella policies issued by National Union. The court did certify its decision pursuant to Civil Rule 54(B) by including the language "no just cause for delay."

National Union filed a Motion for Reconsideration, something that does not exist, with the trial court and subsequently filed a Notice of Appeal with the Fourth District. National Union then dismissed their own appeal under the misguided belief that the trial court could vacate its own decision, something it erroneously did. National Union had filed its Notice of Appeal to the

Fourth District before the trial court's action. Subsequently, National Union moved the Fourth District to dismiss their appeal and on October 4, 2006, the Fourth District granted their motion.

On December 7, 2006, the Walburns served a Second Motion for Summary Judgment. The Trial Court granted his motion on December 12, 2006. On December 27, 2006, National Union filed an appeal.

On June 19, 2007, the Fourth District issued a judgment entry in which it 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, 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 and allowed the Walburns the opportunity to submit a memorandum contra.

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

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 judgments were nullities because there is no mechanism for a trial court to reconsider a final order. See *Pitts* at 378.

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.

Accordingly, we dismiss this appeal for lack of jurisdiction.

Walburn v. Dunlap, 4th App. Dist. No, 06CA655, ¶11-13.

III ARGUMENTS IN OPPOSITION OF PROPOSITIONS OF LAW

The Court of Appeals of the Fourth Appellate District recently granted National Union's motion to certify a conflict. The Appellate Court framed the issue:

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 Civ.R. 54(B) certification, but does not address the issue of damages?

With all due respect to the Appellate Court, this is not the issue and not the determinative fact in this case. National Union's position became a nullity when they dismissed their own appeal and this very Court of Appeals ruled their subsequent filing untimely. The issues framed by both National Union and the Court of Appeals of the Fourth District are improper. By simply reviewing the Fourth District's decision of October 2, 2007, it is apparent that National Union's appeal was dismissed due to lack of jurisdiction. The question then becomes, if National Union has not properly transferred jurisdiction to this Appellate Court, then how can this Appellate Court rule that there is a conflict in final appealable orders? To hold such is internally inconsistent.

National Union's propositions of law are irrelevant to the matter at issue. Whether or not the judgment was a final appealable order is inconsequential to this matter. This is because

National Union dismissed their own appeal, thereby terminating any right to further appeal the trial court's decision.

“The Ohio Supreme Court has consistently held that while an appeal is pending, the trial court is without jurisdiction except to take action in aid of the appeal.” Ray v. Dickinson, 7th App. Dist. No. 03-BE-29, 2004-Ohio-3632, P9, citing McAuley v. Smith (1998), 82 Ohio St. 3d 393, 395, 1998 Ohio 402, 696 N.E.2d 572; Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc. (1997), 79 Ohio St.3d 98, 101-102, fn. 5, 1997 Ohio 402, 679 N.E.2d 1084.

In this case, the trial court had no jurisdiction to disturb its final order of August 28, 2006. This position has been previously briefed and will not be repeated here. As such, when National Union dismissed its appeal to the August 28, 2006 entry, it effectively terminated its right to further challenge the trial court's determination. Since any entry after the trial court's August 28, 2006 entry is a nullity, any subsequent appeal by National Union should be considered at best untimely and more specifically a nullity as well. Once National Union dismissed their appeal, they effectively ratified the trial court's determination. One does not even reach the issue of conflicting appealable decisions if National Union has not perfected a timely appeal. The issue of conflicting jurisdiction is a secondary issue that is not reached under this scenario.

IV CONCLUSION

For the foregoing reasons, the Walburns respectfully submit that this case does not involve any substantial constitutional questions or issues of public or great general interest. Furthermore, the issue of conflicting jurisdictions is not reached when the appellate court is not properly vested with jurisdiction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Memorandum in Opposition of Jurisdiction was served by regular U.S. mail, prepaid on: Christopher Van Blargan, Esq., Janik & Dorman, 9200 South Hills Boulevard, Suite 300, Cleveland, Ohio 44147 on this 12th day of December, 2007.

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