

IN THE SUPREME COURT OF OHIO

STYRK WALBURN, <i>et al.</i>,)	
)	Supreme Court Case Nos. 2007-2150 &
Plaintiffs-Appellees,)	2007-2302
)	
v.)	
)	
WENDY SUE DUNLAP, <i>et al.</i>,)	
)	On Appeal from the Vinton County
Defendants,)	Court of Appeals, Fourth Appellate
)	District No. 06 CA 655
and)	
)	
NATIONAL UNION FIRE INSURANCE)	
COMPANY OF PITTSBURGH,)	
PENNSYLVANIA)	
)	
Defendant-Appellant.)	

**MERIT BRIEF OF DEFENDANT-APPELLANT NATIONAL UNION FIRE
INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA**

C. RUSSELL CANESTRARO (0061235)
 AGREE, CLYMER, MITCHELL &
 LARET
 89 E. Nationwide Blvd., 2nd Floor
 Columbus, Ohio 43215
 (614) 221-3318
 (614) 221-7308 (fax)
Russ@agreeclymer.com

Attorney for Plaintiffs-Appellees

STEVEN G. JANIK (0021934)
 Counsel of Record
 CHRISTOPHER VAN BLARGAN (0066077)
 JANIK, DORMAN & WINTER, L.L.P.
 9200 South Hills Boulevard, Suite 300
 Cleveland, Ohio 44147
 (440) 838-7600
 (440) 838-7601 (fax)
Steven.Janik@Janiklaw.com
Chris.VanBlargan@Janiklaw.com

Attorneys for Defendant-Appellant National
 Union Fire Insurance Company of Pittsburgh,
 Pennsylvania

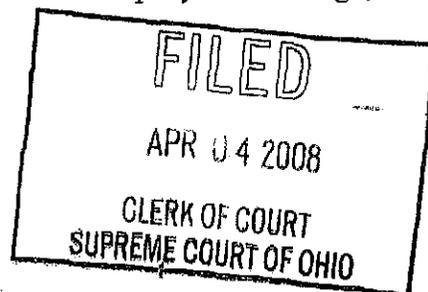


TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

INTRODUCTION.....1

STATEMENT OF FACTS.....2

ARGUMENT.....7

Certified Question of Law: In a case involving multiple claims, is a judgment in a 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?7

First Proposition Of Law: An interlocutory order of partial summary judgment in a special proceeding which declares that an insured is entitled to coverage, but which does not rule upon whether the insured is entitled to damages, is not a final, appealable order despite the trial court’s certification under R.C. § 2505.02(B)(2) and Civil Rule 54(B). [R.C. § 2505.02 and Civil Rule 54(B), interpreted].....7

Second Proposition Of Law: An interlocutory order of partial summary judgment which declares that an insured is entitled to coverage, but does not rule upon whether the insured is entitled to damages, is not a final, appealable order despite the trial court’s certification under R.C. § 2505.02(B)(2) and Civil Rule 54(B). [R.C. § 2505.02(B)(2) and Civil Rule 54(B), interpreted]7

CONCLUSION13

PROOF OF SERVICE.....14

APPENDIX Appx. Page

Notice of Certified Conflict
(Dec. 12, 2007) A1

Notice of Appeal to Supreme Court of Ohio
(Nov. 16, 2007)..... A4

Decision of Court of Appeals, Fourth Appellate District
(Dec. 3, 2007) A7

Decision of Court of Appeals, Fourth Appellate District
(Oct. 2, 2007)..... A10

Decision of Court of Appeals, Fourth Appellate District (Oct. 2, 2007).....	A19
Decision of Court of Appeals, Fourth Appellate District (Oct. 4, 2006).....	A21
Order of Court of Common Pleas for Vinton County, Ohio (Dec. 12, 2006).....	A22
Order of Common Pleas for Vinton County, Ohio (Sep. 25, 2006).....	A26
Order of Court of Common Pleas for Vinton County, Ohio (Aug. 28, 2006).....	A27
 <u>STATUTES AND CIVIL RULES</u>	
R.C. § 2505.02.....	A31
Civil Rule 54.....	A33

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<i>Adkins v. Bratcher</i> , 4 th Dist. No. 06CA53, 2007-Ohio-3587	8
<i>Bautista v. Kolis</i> , 142 Ohio App.3d 169, 2001-Ohio-3159, 754 N.E.2d 820	8, 11, 12
<i>Beheshtaein v. American State Ins. Co.</i> , 2 nd Dist. No. 20839, 2005-Ohio-5907	3, 6, 12
<i>Britton v. Gibbs Assoc.</i> , 4 th Dist. No. 06CA34, 2008-Ohio-210	8
<i>Evans v. Rock Hill Local School Dist. Bd. Of Edn.</i> , 4 th Dist. No. 04CA39, 2005-Ohio-5318	12
<i>Hayes v. White</i> , 7 th Dist. No. 01 CO 00, 2001-Ohio-3467	8, 11, 12
<i>Layman v. Welch</i> , 7 th Dist. No. 05-JE-3, 2006-Ohio-1157	12
<i>Mansfield & Sandusky City R. Co. v. John P. Veeder & Co.</i> (1848), 17 Ohio 385.....	8
<i>Mattison v. Khalil</i> , 6 th Dist. No. L-07-1393, 2008-Ohio-716.....	8, 10, 12
<i>Meeke R & D, Inc. v. Evenflo Co., Inc.</i> , 11 th Dist. No. 2006-P-0019, 2006-Ohio-3885	8, 10, 12
<i>Ohio and Vicinity Regional Council of Carpenters v. McMarty</i> , 11 th Dist. No. 2005-T-0063, 2006-Ohio-2019.....	8, 10-12
<i>Regional Imaging Consultants Corp. v. Computer Billing Services, Inc.</i> , 7 th Dist. No. 00 CA 79, 2001-Ohio-3457	8-10, 12
<i>Stewart v. State Farm Mut. Auto. Ins. Co.</i> , 6 th Dist. No. L-05-1285, 2005-Ohio-5740.....	8
<i>Tinker v. Oldaker</i> , 10 th Dist. Nos. 03AP-671, 03AP-1036, 2004-Ohio-3316	3, 6, 11, 12

Walter v. Allstate Ins. Co.,
9th Dist. No. 21032, 2002-Ohio-57756, 12

Wisintainer v. Elcen Power Strut. Co. (1993),
67 Ohio St.3d 352, 617 N.E.2d 1136.....7

STATUTES AND RULES

R.C. § 2505.02(B).....1, 4, 7-9, 11, 13

Civil Rule 54(B)1, 7-9, 11, 13

INTRODUCTION

The sole issue presented on appeal is whether an interlocutory order of partial summary judgment that declares an insured is entitled to coverage, but which does not rule upon whether the insured is entitled to damages, is a final, appealable order under R.C. § 2505.02(B)(2) as to permit certification under Civ. R. 54(B). National Union respectfully submits that where an insured's demand for declaratory relief is made in the context of, and inextricably intertwined with, the insured's action for breach of contract, an interlocutory order of partial summary judgment that declares coverage is not "made in a special proceeding" as to permit certification under R.C. § 2505.02(B)(2) and Civil Rule 54(B). National Union further respectfully submits that an interlocutory order of partial summary judgment that declares coverage in an action for breach of contract, but which does not rule upon whether the insured is entitled to damages, does not "affect a substantial right" as to permit certification under R.C. § 2505.02(B)(2) and Civil Rule 54(B).

STATEMENT OF FACTS

On January 22, 2003, Plaintiffs-Appellees Styrk and Betty Walburn (“the Walburns”) filed their Complaint against Wendy Sue Dunlap (“Dunlap”), Ohio Mutual Insurance Company, National Union and The Cincinnati Insurance Company. The Walburns alleged 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.” [*Tr.R.* 1].¹ The Walburns further alleged that:

14. National Union issued a policy of insurance bearing policy No. RM CA 320-88-30 to [the] 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.

¹ *Tr. R.* cites to the Record of the Vinton County Court of Common Pleas; *Walburn I R.* cites to the Supplemental Record of the Vinton County Court of Appeals in Case No. 06 CA 653; *Walburn II R.* cites to the Record of the Vinton County Court of Appeals in Case No. 06 CA 655; and *Appx.* cites to the Appendix to this Brief.

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).

[Tr.R. 1] (*emphasis added*). By their Prayer, the Walburns sought a declaration of their rights, as well as a 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).” [Tr.R. 1].

On March 31, 2004, the Walburns served National Union with 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.” [Tr.R. 44A]. The Walburns did not, however, seek summary judgment against Dunlap, the alleged tortfeasor, or an award of compensatory damages against Dunlap or National Union.

On August 28, 2006, the Trial Court entered partial summary judgment in favor of the Walburns, finding that they were entitled to uninsured motorist coverage under National Union’s policies. [Tr.R. 90, Appx. at A27]. The Trial Court did not award damages, but nonetheless certified its order pursuant to Civil Rule 54(B), finding “no just cause for delay.” [Tr.R. 90, Appx. at A30].

On September 12, 2006, based upon the Tenth District’s² decision in *Tinker v. Oldaker*, 10th Dist. Nos. 03AP-671, 03AP-1036, 2004-Ohio-3316 and the Second District’s decision in *Beheshtaein v. American State Ins. Co.*, 2nd Dist. No. 20839, 2005-Ohio-5907, National Union filed a Motion for Reconsideration in the Trial Court. By this Motion, National Union raised the

² In the interest of brevity, National Union will refer to the Court of Appeals, Tenth Appellate District, as the Tenth District, and will refer to all other Ohio Appellate Districts in the same fashion.

issue of whether the Trial Court's August 28, 2006 order was a final, appealable order under R.C. § 2505.02(B)(2) as it did not rule upon whether the Walburns were entitled to damages. [*Tr.R.* 93].³

At 9:19 a.m. on September 25, 2006, National Union filed its Notice appealing the entry of partial summary judgment in favor of the Walburns to the Fourth District which was assigned Case Number 06 CA 653 ("*Walburn I*"). [*Walburn I R.* 1]. At 3:07 p.m. the same day, the Trial Court granted National Union's Motion for Reconsideration, and vacated its August 28, 2006 order on grounds that it was not a final, appealable order. [*Tr.R.* 97, *Appx.* at A26]. Accordingly, on September 26, 2006, National Union moved the Fourth District to dismiss its appeal pursuant to Appellate Rule 28, attaching as an exhibit a copy of the Trial Court's order of September 25, 2006 granting National Union's Motion to Reconsider. [*Walburn I R.* 4]. On October 4, 2006, the Fourth District granted National Union's Motion and dismissed the appeal. [*Walburn I R.* 5, *Appx.* at A21].

On December 7, 2006, the Walburns served a Second Motion for Summary Judgment in which they sought judgment against National Union on grounds that the Trial Court's August 28, 2006 order was a final, appealable order, and that once National Union dismissed its appeal of that order it became the law of the case. [*Tr.R.* 106]. Additionally, for the first time the Walburns sought summary judgment against Dunlap. [*Tr.R.* 106].

On December 12, 2006, without affording National Union an opportunity to oppose this Motion, the Trial Court entered partial summary judgment in favor of the Walburns; but only

³ National Union also raised the issue of whether the Trial Court's decision was a final, appealable order as it did not rule upon whether the Walburns were entitled to damages from Dunlap, the alleged tortfeasor. Indeed, the Trial Court's resolution of such damage claims was a prerequisite to its determination that the Walburns were entitled to uninsured motorist coverage under National Union's policies in that, by definition, Dunlap was not "a person liable in tort" to the Walburns and therefore not an uninsured motorist.

against National Union, not against Dunlap. [*Tr.R.* 107, *Appx.* at 22]. On December 27, 2006, National Union filed its Notice appealing this order to the Fourth District, which was assigned Case Number 06 CA 655 (“*Walburn I*”). [*Walburn II R.* 1]

On June 19, 2007, four months after the parties completed their briefs on the merits, the Fourth District *sua sponte* questioned whether it had jurisdiction to hear National Union’s appeal in *Walburn II*:

It appears the trial court’s August 28, 2006 judgment, which it tried to vacate, is the final, appealable order finding coverage in favor of the Walburns. While National Union did initially appeal that judgment, it subsequently voluntarily dismissed the 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 court’s corresponding judgment were nullities because there is no mechanism for a trial court to reconsider a final order. On October 4, 2006, when we granted National Union’s motion to voluntarily dismiss the appeal, the right to appeal the trial court’s August 28, 2006 declaration of the Walburns’ right to coverage was effectively terminated.

[*Walburn II R.* 20]. The Fourth District ordered National Union to submit a Memorandum in Support of Jurisdiction to avoid dismissal of its appeal.

On July 2, 2007, National Union filed its Memorandum in Support of Jurisdiction asserting that the Trial Court had improperly certified both its August 28, 2006 and December 12, 2006 orders as final, appealable orders, and therefore, *Walburn I* was properly dismissed, and that the appeal in *Walburn II* should also be dismissed, because the Fourth District lacked jurisdiction to hear either appeal. [*Walburn II R.* 21]. In an abundance of caution, National Union also filed a motion to vacate the Fourth District’s dismissal of *Walburn I*, and to reinstate this appeal, in the event that the Fourth District concluded otherwise. [*Walburn I R.* 7].

On October 2, 2007, the Fourth District dismissed *Walburn II*, finding that the Trial Court's August 28, 2006 order "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," and that by voluntarily dismissing its appeal in *Walburn I*, National Union forfeited its right to proceed in *Walburn II*. [*Walburn II R. 26, Appx. at A14*]. By separate entry, the Fourth District denied National Union's Motion to Vacate, holding that Civil Rule 60(B) does not apply to cases on appeal, and thus, it lacked authority to vacate its dismissal of *Walburn I*. [*Walburn I R. 10*].

On October 11, 2007, National Union filed a Motion to Certify Conflict with the Fourth District in *Walburn II*, asserting that the Fourth District's decision was in conflict with the Tenth District's decision in *Tinker*, the Second District's decision in *Beheshtaein*, and the Ninth District's decision in *Walter v. Allstate Ins. Co.*, 9th Dist. No. 21032, 2002-Ohio-5775 [*Walburn II R. 28*]. On November 15, 2007, National Union filed its Notice appealing *Walburn I* to this Court, which was assigned Case Number 07-2140. On November 16, 2007, National Union filed its Notice appealing *Walburn II* to this Court, which was assigned Case Number 07-2150. [*Appx. at A4*].

On December 3, 2007, the Fourth District granted National Union's Motion to Certify Conflict [*Walburn II R. 31*], and on December 12, 2007 National Union filed its Notice of Certified Conflict with this Court. [*Appx. at A1*]. On January 23, 2008, this Court agreed to hear the certified conflict, accepted appeal of the first and second propositions of law in Case Number 07-2150, and consolidated the certified conflict with this appeal. On February 20, 2008, this Court declined jurisdiction in Case Number 07-2140.

ARGUMENT

Certified Question of Law: In a case involving multiple claims, is a judgment in a 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?

First Proposition Of Law: An interlocutory order of partial summary judgment in a special proceeding which declares that an insured is entitled to coverage, but which does not rule upon whether the insured is entitled to damages, is not a final, appealable order despite the trial court's certification under R.C. § 2505.02(B)(2) and Civil Rule 54(B). [R.C. § 2505.02 and Civil Rule 54(B), interpreted]

Second Proposition Of Law: An interlocutory order of partial summary judgment which declares that an insured is entitled to coverage, but does not rule upon whether the insured is entitled to damages, is not a final, appealable order despite the trial court's certification under R.C. § 2505.02(B)(2) and Civil Rule 54(B). [R.C. § 2505.02(B)(2) and Civil Rule 54(B), interpreted]

An interlocutory judgment, order, or decree that rules upon some, but not all, of the causes of action and/or claims for relief asserted by an insured is nonetheless immediately appealable under R.C. § 2505.02(B) if it is:

- (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;⁴
- (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment

A stand alone action declaratory judgment action is a special proceeding, and an interlocutory order rendered therein is immediately appealable pursuant to R.C. § 2505.02(B)(2) if it affects a substantial right and is certified pursuant to Civil Rule 54(B). *Wisintainer v. Elcen Power Strut. Co.* (1993), 67 Ohio St.3d 352, 617 N.E.2d 1136. By contrast, an action for breach of contract sounds in the common law and is not a special proceeding, even if the court must declare the rights of the parties as part and parcel of rendering its decision on the breach of

⁴ R.C. § 2505.02(B)(1) is clearly not applicable because National Union can still prevail at trial if the jury rules against the Walburns on the issue of Dunlap's liability or awards no damages.

contract claim.⁵ Thus, an interlocutory order rendered in a breach of contract action does not fall within R.C. § 2505.02(B)(2), and is not immediately appealable even if the court should certify it under Civil Rule 54(B). *Britton v. Gibbs Assoc.*, 4th Dist. No. 06CA34, 2008-Ohio-210, at ¶ 8; *Adkins v. Bratcher*, 4th Dist. No. 06CA53, 2007-Ohio-3587, at ¶ 8; *Ohio and Vicinity Regional Council of Carpenters v. McMarty*, 11th Dist. No. 2005-T-0063, 2006-Ohio-2019, at ¶ 10.

As the Sixth District observed in *Stewart v. State Farm Mut. Auto. Ins. Co.*, 6th Dist. No. L-05-1285, 2005-Ohio-5740, at ¶ 18, confusion arises as to whether an interlocutory order granting declaratory judgment is a final, appealable order in those cases where the plaintiff seeks compensatory damages for breach of contract in addition to declaratory relief. Most districts have concluded that such an action should be construed as one for breach of contract, and any interlocutory order rendered therein for declaratory relief will not become final and appealable until the issue of damages is ruled upon. *Mattison v. Khalil*, 6th Dist. No. L-07-1393, 2008-Ohio-716, at ¶ 16; *Meeker R & D, Inc. v. Evenflo Co., Inc.*, 11th Dist. No. 2006-P-0019, 2006-Ohio-3885, at ¶ 9; *Ohio and Vicinity Regional Council of Carpenters v. McMarty*, 11th Dist. No. 2005-T-0063, 2006-Ohio-2019, at ¶¶ 10-12; *Hayes v. White*, 7th Dist. No. 01 CO 00, 2001-Ohio-3467; *Regional Imaging Consultants Corp. v. Computer Billing Services, Inc.*, 7th Dist. No. 00 CA 79, 2001-Ohio-3457; *Bautista v. Kolis*, 142 Ohio App.3d 169, 2001-Ohio-3159, 754 N.E.2d 820 (7th Dist.).

⁵ R.C. § 2505.02(A)(2) defines a special proceeding as “an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.” As breach of contract actions originated under English common law, they are not special proceedings, even though courts may be required to interpret the contracts at issue and declare the rights of the parties thereunder. *See, e.g., Mansfield & Sandusky City R. Co. v. John P. Veeder & Co.* (1848), 17 Ohio 385 (interpreting the meaning of a contract term in an action seeking specific performance of a contract).

In *Regional Imaging Consultants*, the plaintiff brought an action seeking a declaration that non-competition clauses contained in various agreements were unenforceable, damages for defamation, and damages for breach of contract. The trial court entered separate orders for declaratory relief and defamation, but did not rule upon the breach of contract claim or award compensatory damages. Nevertheless, the trial court certified its interlocutory orders pursuant to R.C. § 2505.02(B) and Civil Rule 54(B).

On appeal, the Seventh District held that certification under Civil Rule 54(B), in and of itself, did not render the trial court's interlocutory orders final and appealable:

An order of a court is final and appealable only if it meets the requirements of both Civ.R. 54(B) and R.C. § 2505.02. *Denham v. New Carlisle* (1999), 86 Ohio St.3d 594, 596. “[T]he entire concept of ‘final orders’ is based upon the rationale that the court making an order which is not final is thereby retaining jurisdiction for further proceedings. A final order, therefore, is one disposing of the whole case or some separate and distinct branch thereof.” *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, quoting *Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, 306.

Civ.R. 54(B) states, in pertinent part:

When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, 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.

The general purpose of Civ.R. 54(B) is to, “accommodate the strong policy against piecemeal litigation with the possible injustice of delayed appeals in special situations.” *Noble v. Colwell, supra*, at 96, citing *Alexander v. Buckeye Pipe Line Co.* (1977), 49 Ohio St.2d 158, 160.

The trial court certified both judgment entries to be final appealable orders when it added the words, “there is no just reason for delay,” as required by Civ.R. 54(B). For the purposes of Civ.R. 54(B) certification, the trial court makes a factual determination of whether or not an interlocutory appeal is consistent with the interests of sound judicial administration. *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352,

paragraph one of syllabus. “In making its factual determination that the interest of sound judicial administration is best served by allowing an immediate appeal, the trial court is entitled to the same presumption of correctness that it is accorded regarding other factual findings. An appellate court should not substitute its judgment for that of the trial court where some competent and credible evidence supports the trial court's factual findings.” *Id.* at 355.

While this is a very deferential standard, and appellate courts have been reluctant to strike such a certification, ***the trial court's use of the “magic language” of Civ.R. 54(B) does not, by itself, convert a final order into a final appealable order. The phrase “no just reason for delay” is not a mystical incantation that transforms a non-final order into a final appealable order. Chef Italiano Corp. v. Kent State Univ.*** (1989), 44 Ohio St.3d 86. See *Bell Drilling & Producing Co. v. Kilbarger Const., Inc.* (June 26, 1997), Stark App. No. 96CA23, unreported; *Ralston v. Scalia* (Jan. 10, 1994), Stark App. No. CA-9344, unreported (appeals dismissed for lack of final appealable order notwithstanding the presence of no just reason for delay language).

Id. at 5-6 (***emphasis added***).

The Seventh District went on to conclude that the trial court's orders were not final and appealable under R.C. § 2505.02(B)(2) because the plaintiff's prayer for declaratory judgment was inextricably intertwined with its breach of contract claim, as opposed to being a stand alone action for declaratory judgment, and thus the orders were not rendered in a special proceeding:

It is true that a declaratory judgment action, ***by itself***, is a special proceeding under R.C. § 2505.02. See *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 22 (dealing with a former version of R.C. § 2505.02). ***Nevertheless, “[p]iecemeal adjudication does not become appealable merely because cast in the form of a declaratory judgment.”*** *Curlott v. Campbell* (C.A.9, 1979), 598 F.2d 1175, 1180, citing *Liberty Mutual Insurance Co. v. Wetzel* (1976), 424 U.S. 737, 742-744. ***The declaratory judgment claim was asserted within the context of an ordinary civil action for breach of contract, and it is the underlying action which governs our analysis.*** *Stevens v. Ackman* (2001), 91 Ohio St.3d 182, 188.

Id. at 6 (***emphasis added***); accord, *Mattison*, 6th Dist. No. L-07-1393, 2008-Ohio-716; *Meeker R & D, Inc.*, 11th Dist. No. 2006-P-0019, 2006-Ohio-3885; *Ohio and Vicinity Regional Council of*

Carpenters, 11th Dist. No. 2005-T-0063, 2006-Ohio-2019; *Hayes*, 7th Dist. No. 01 CO 00, 2001-Ohio-3467; *Bautista*, 142 Ohio App.3d 169, 2001-Ohio-3159, 754 N.E.2d 820.

In the present case, the Walburns sought not only a declaration that they were entitled to uninsured motorist coverage under National Union's policies, but also "an amount which will adequately compensate them for their damages, said amount being in excess of Twenty-Five Thousand Dollars (\$25,000.00)." [Tr.R. 1]. As such, their action for declaratory relief was inexplicably intertwined with their breach of contract action, and was not a stand alone special proceeding as to permit certification under R.C. § 2505.02(B)(2) and Civil Rule 54(B). Accordingly, the Fourth District lacked jurisdiction over *Walburn I* and *Walburn II* because the Trial Court's August 28, 2006 and December 12, 2006 orders were not final, appealable orders.

Even if this Court concludes that the Trial Court's August 28, 2006 and December 12, 2006 orders were rendered in a special proceeding, R.C. § 2505.02(B)(2) is nonetheless inapplicable because the orders did not affect a substantial right. In *Tinker*, the Tenth District held that an order of partial summary judgment which declared an insured's rights under an insurance policy, but which did not rule upon whether the insured was entitled to damages, did not affect a substantial right and therefore was improperly certified under R.C. § 2505.02(B) and Civil Rule 54(B):

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.

10th Dist. Nos. 03AP-671, 03AP-1036, 2004-Ohio-3316, at ¶¶ 11 – 14 (*emphasis added*); *accord, Layman v. Welch*, 7th Dist. No. 05-JE-3, 2006-Ohio-1157, at ¶¶ 8-17; *Beheshtaein*, 2nd Dist. No. 20839, 2005-Ohio-5907; *Walter*, 9th Dist. No. 21032, 2002-Ohio-5775; *see also, Evans v. Rock Hill Local School Dist. Bd. Of Edn.*, 4th Dist. No. 04CA39, 2005-Ohio-5318, at ¶¶ 15-20.

National Union respectfully submits that *Mattison, Meeker R & D, Inc., Ohio and Vicinity Regional Council of Carpenters, Hayes, Bautista, Tinker, Beheshtaein* and *Walter* represent the better reasoned view because, as the Seventh District observed in *Regional Imaging Consultants*, adoption of the Fourth District's holding will result in multiple, piecemeal appeals which will, in turn, have a staggering effect on parties, counsel and the courts.

National Union further respectfully submits that this Court should adopt this better reasoned view, and hold that an interlocutory order of partial summary judgment which declares that an insured is entitled to coverage, but which does not rule upon whether the insured is entitled to damages, is not a final, appealable order despite certification under R.C. § 2505.02(B) and Civil Rule 54(B).

CONCLUSION

Based upon the foregoing, National Union respectfully submits that the Trial Court's interlocutory orders of August 28, 2006 and December 12, 2006 were not final, appealable orders, and therefore this Court should reverse the Fourth District's October 2, 2007 decision in *Walburn II* and remand to the Trial Court for further proceedings consistent with this Court's opinion.

Respectfully submitted,



STEVEN G. JANIK (0021934)
CHRISTOPHER J. VAN BLARGAN (0066077)
JANIK, DORMAN & WINTER, L.L.P.
9200 South Hills Boulevard, Suite 300
Cleveland, Ohio 44147-3521
(440) 838-7600 ♦ Fax (440) 838-7601
Email: Steven.Janik@JanikLaw.com
Chris.VanBlargan@JanikLaw.com

Attorneys for Defendant-Appellant National Union Fire
Insurance Company of Pittsburgh, Pennsylvania

PROOF OF SERVICE

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

April 3, 2008:

C. Russell Canestraro
Steven M. Kirchner
Agee, Clymer, Mitchell & Laret
89 E. Nationwide Blvd., 2nd Floor
Columbus, OH 43215

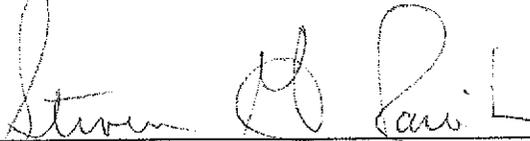
Attorneys for Plaintiffs-Appellees:

Wendy Sue Dunlap
501 Pike Street, Apt. 2
Coal Grove, Ohio 45638

Defendant

John P. Petro, Esq.
Williams & Petro Co., L.L.C.
338 South High Street, 2nd Floor
Columbus, OH 43215

Attorney for Ohio Mutual Insurance Group



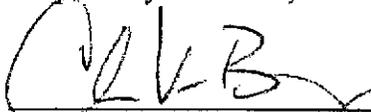
STEVEN G. JANIK (0021934)
CHRISTOPHER J. VAN BLARGAN (0066077)
JANIK, DORMAN & WINTER, L.L.P.
9200 South Hills Boulevard, Suite 300
Cleveland, Ohio 44147-3521
(440) 838-7600 ♦ Fax (440) 838-7601
Email: Steven.Janik@JanikLaw.com
Chris.VanBlargan@JanikLaw.com

Attorneys for Defendant-Appellant National Union Fire
Insurance Company of Pittsburgh, Pennsylvania

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,



STEVEN G. JANIK (0021934)
CHRISTOPHER J. VAN BLARGAN (0066077)
JAMES R. VAUGHN (0036866)
JANIK & DORMAN, L.L.P.
9200 South Hills Boulevard, Suite 300
Cleveland, Ohio 44147-3521
(440) 838-7600 ♦ Fax (440) 838-7601
Email: Steven.Janik@JanikLaw.com
Chris.VanBlargan@JanikLaw.com
Jim.Vaughn@Janiklaw.com

*Attorneys for Defendant/ Appellant
National Union Fire Insurance Company
of Pittsburgh, PA*

CERTIFICATE OF SERVICE

The foregoing was served on the following by regular U.S. Mail, postage prepaid,
on December 11th, 2007:

C. Russell Canestraro
Steven M. Kirchner
Agee, Clymer, Mitchell & Laret
89 E. Nationwide Blvd., 2nd Floor
Columbus, OH 43215
Attorneys for Plaintiffs-Appellees:

Wendy Sue Dunlap
501 Pike Street, Apt. 2
Coal Grove, Ohio 45638
Defendant

John P. Petro, Esq.
Williams & Petro Co., L.L.C.
338 South High Street, 2nd Floor
Columbus, OH 43215
Attorney for Ohio Mutual Insurance Group



STEVEN G. JANIK (0021934)
CHRISTOPHER J. VAN BLARGAN (0066077)
JAMES R. VAUGHN (0036866)
JANIK & DORMAN, L.L.P.
9200 South Hills Boulevard, Suite 300
Cleveland, Ohio 44147-3521
(440) 838-7600 ♦ Fax (440) 838-7601
Email: Steven.Janik@JanikLaw.com
Chris.VanBlargan@JanikLaw.com
Jim.Vaughn@Janiklaw.com

*Attorneys for Defendant/ Appellant
National Union Fire Insurance Company
of Pittsburgh, PA*

Case No. 07-2150

IN THE SUPREME COURT OF OHIO

STYRK WALBURN, *et al.*,

Plaintiffs-Appellees,

v.

WENDY SUE DUNLAP, *et al.*,

Defendant-Appellant.

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

**NOTICE OF APPEAL OF DEFENDANT/APPELLANT
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA**

C. RUSSELL CANESTRARO (0061235)
AGREE, CLYMER, MITCHELL &
LARET
89 E. Nationwide Blvd., 2nd Floor
Columbus, Ohio 43215
(614) 221-3318
(614) 221-7308 (fax)
Russ@agreeclymer.com

Attorney for Plaintiffs-Appellees

STEVEN G. JANIK (0021934)
Counsel of Record
CHRISTOPHER VAN BLARGAN (0066077)
JANIK & DORMAN, L.L.P.
9200 South Hills Boulevard, Suite 300
Cleveland, Ohio 44147
(440) 838-7600
(440) 838-8530 (fax)
Steve.Janik@Janiklaw.com
Chris.VanBlargan@Janiklaw.com

Attorneys for Defendant-Appellant National
Union Fire Insurance Company of Pittsburgh,
PA.

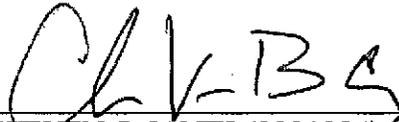
FILED
NOV 16 2007
CLERK OF COURT
SUPREME COURT OF OHIO

**NOTICE OF APPEAL OF DEFENDANT/APPELLANT NATIONAL UNION
FIRE INSURANCE COMPANY OF PITTSBURGH, PA**

Appellant National Union Fire Insurance Company of Pittsburgh, PA ("National Union") hereby gives notice of its appeal to the Supreme Court of Ohio from the Entry of the Vinton County Court of Appeals, Fourth Appellant District, entered in Case No. 06 CA 655 and captioned *Walburn v. Dunlap*, on October 2, 2007.

National Union respectfully submits that this case involves issues of public and great general interest. National Union further submits that there is a conflict between the Fourth District's Decision and the decisions of other Ohio appellate districts, and a motion to certify conflict is currently pending in the Fourth District.

Respectfully submitted,



STEVEN G. JANIK (0021934)
CHRISTOPHER J. VAN BLARGAN (0066077)
JANIK & DORMAN, L.L.P.
9200 South Hills Boulevard, Suite 300
Cleveland, Ohio 44147-3521
(440) 838-7600 ♦ Fax (440) 838-7601
Email: Steven.Janik@JanikLaw.com
Chris.VanBlargan@JanikLaw.com

*Attorneys for Defendant/ Appellant
National Union Fire Insurance Company
of Pittsburgh, PA*

CERTIFICATE OF SERVICE

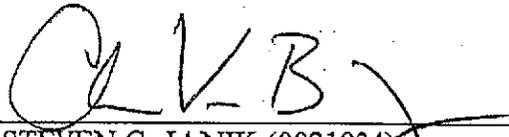
The foregoing was served on the following by regular U.S. Mail, postage prepaid,

on November 15, 2007:

C. Russell Canestraro
Steven M. Kirchner
Agee, Clymer, Mitchell & Laret
89 E. Nationwide Blvd., 2nd Floor
Columbus, OH 43215
Attorneys for Plaintiffs-Appellees:

Wendy Sue Dunlap
501 Pike Street, Apt. 2
Coal Grove, Ohio 45638
Defendant

John P. Petro, Esq.
Williams & Petro Co., L.L.C.
338 South High Street, 2nd Floor
Columbus, OH 43215
Attorney for Ohio Mutual Insurance Group



STEVEN G. JANIK (0021934)
CHRISTOPHER J. VAN BLARGAN (0066077)
JANIK & DORMAN, L.L.P.
9200 South Hills Boulevard, Suite 300
Cleveland, Ohio 44147-3521
(440) 838-7600 ♦ Fax (440) 838-7601
Email: Steven.Janik@JanikLaw.com
Chris.VanBlargan@JanikLaw.com

*Attorneys for Defendant/ Appellant
National Union Fire Insurance Company
of Pittsburgh, PA*

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

LISA GILLILAND, CLERK
DEC 3 2007
COURT OF APPEALS
VINTON COUNTY, OHIO

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 Biargan, 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.

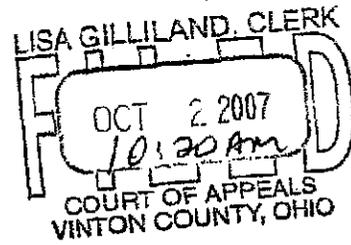
McFartland, P.J. & Kline, J.: Concur.

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,

v.

Wendy Sue Duniap, et al.,

Defendants,

and

National Union Fire Insurance
Company of Pittsburgh, PA.,

Defendant-Appellant.

Case No. 06CA655

DECISION AND JUDGMENT ENTRY
OF DISMISSAL

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.

{11} 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.



Docketed ___ / Juris ___ / Scanned ___

2-1988

{¶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

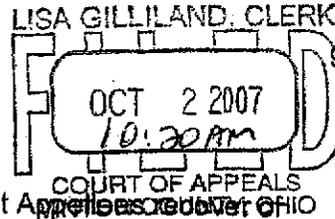
issue of coverage, but without any determination of damages, "is not a final appealable order and we lack jurisdiction[.]" Id.

{¶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 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.

ORIGINAL

LISA GILLILAND, CLERK

OCT 2 2007
10:15 AM
COURT OF APPEALS
VINTON COUNTY, OHIO

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

Styrk Walburn, et. al., : Case No. 08CA653
 Plaintiffs-Appellees, : ENTRY
 v. :
 Wendy Sue Dunlap, :
 Defendant, :
 and :
 National Union Fire Insurance :
 Company of Pittsburgh, PA, :
 Defendant-Appellant.

1-8-07
1-1-R

Appellant, National Union Fire Insurance Company of Pittsburgh, PA, has filed a motion pursuant to Civ.R. 60(B)(1) and (5) to vacate our October 4, 2006 entry granting its motion to voluntarily dismiss its appeal. For the reasons that follow, appellant's motion is DENIED.

"Civ.R. 60(B) is clearly inappropriate to review [a] court's judgment on appeal." *Martin v. Roeder*, 75 Ohio St.3d 603, 604, 1996-Ohio-451. See, also, Civ.R. 1(C) (providing that "[t]hese rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling ..."). Instead, the Rules of Appellate Procedure govern appeals from trial courts to courts of appeal in Ohio. *Martin* at 604. See, also, App.R. 1(A).

Furthermore, even if we construe appellant's motion to vacate as an App.R. 26(A) application for reconsideration, it is untimely. An "[a]pplication for reconsideration

Docketed / Juris / Scanned

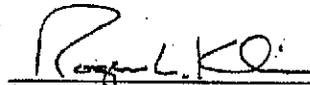
AI

of any cause or motion submitted on appeal *shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later.* *** (Emphasis added.) Under this rule, appellant's application for reconsideration should have been filed within 10 days of our October 4, 2006 entry. Because the 10th day was a Saturday, appellant had until October 16, 2007 to file its application. Appellant, without showing extraordinary circumstances as required by App.R. 14(B) to extend this time, filed its motion on July 2, 2007, 9 months after the date of our entry, making it untimely.

MOTION DENIED. IT IS SO ORDERED.

McFarland, P.J., Harsha, J.: Concur.

FOR THE COURT



Roger L. Kline
Administrative Judge

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

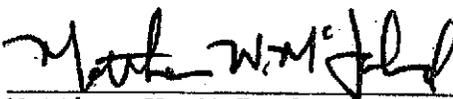
LISA GILLILAND, CLERK
OCT 4 2006
9:37 AM
COURT OF APPEALS
VINTON COUNTY, OHIO

Styrk Walburn, et. al., : Case No. 06CA653
Plaintiffs-Appellees, : ENTRY
v. :
Wendy Sue Dunlap, :
Defendant, :
and :
National Union Fire Insurance :
Company of Pittsburgh, PA, :
Defendant-Appellant. :

Appellant, National Union Fire Insurance Company of
Pittsburgh, PA, has filed a motion to voluntarily dismiss this
appeal. Upon consideration, appellant's motion is **GRANTED**.

APPEAL DISMISSED. COSTS TO APPELLANT.

FOR THE COURT,



Matthew W. McFarland
Administrative Judge

Cc: C. Russell Canestraro, Esq.
John P. Petro, Esq.
Lorree L. Dendis, Esq.
Brian D. Spitz, Esq.
Wendy Sue Dunlap

IN THE COMMON PLEAS COURT, VINTON COUNTY, OHIO

FILED

DEC 12 AM 8:35

Wendy Sue Dunlap
VINTON COUNTY
CLERK OF COURTS

Styrk Walburn, et al.,

Plaintiffs

Case No. 03 CV 01-006

vs.

Wendy Sue Dunlap, et al.,

Defendants

JUDGMENT ENTRY

This matter comes on for further consideration of Plaintiffs' Motion For Partial Summary Judgment filed April 2, 2004 and Defendant National Union Fire Insurance Company of Pittsburgh, PA's Motion for Summary Judgment filed April 2, 2004. The Court has considered said motions and supporting exhibits, memoranda in support of and contra to said motions, deposition of Styrk Walburn, stipulations, and the pleadings. The Court has also reviewed various supplemental authority submitted by the parties.

The pertinent facts may be summarized as follows.

- (1) On January 23, 2001 Plaintiff Styrk Walburn was a passenger in a motor vehicle he did not own and that was being driven by Charles Billingsley when there was a collision with a motor vehicle being driven by Defendant Wendy Sue Dunlap. Plaintiff alleges that

2-1988
RECEIVED
12-14-88

Defendant Dunlap was negligent, and that as a result of her negligence, Plaintiff sustained various personal injuries which required medical treatment.

- (2) Plaintiffs Styrk Walburn and Betty Walburn are husband and wife.
- (3) The accident occurred on State Route 93 in Vinton County, Ohio.
- (4) Defendant Wendy Sue Dunlap was uninsured with respect to the collision.
- (5) Plaintiffs were insured under a personal auto policy by Defendant United Ohio Insurance Company with uninsured motorist coverage up to \$200,000.00 per accident.
- (6) Plaintiff Styrk Walburn was in the scope and course of his employment with Sherwin-Williams Company and was a passenger in a motor vehicle owned by Sherwin-Williams at the time of the accident.
- (7) Sherwin Williams Company maintained an insurance program pursuant to a Deductible Indemnity Agreement with Defendant National Union Fire Insurance Company of Pittsburgh, PA which included the issuance of general liability, automobile liability, and umbrella liability policies.

(8) The issue presented by the cross motions for summary judgment is whether Plaintiff is entitled to uninsured motorist coverage under the National Union policies.

DISCUSSION:

The Supreme Court of Ohio has held that the uninsured motorist provisions of the former R.C. 3937.18 apply to fronting policies such as those included as a part of the Sherwin-Williams insurance program with Defendant National Union Fire Insurance Company of Pittsburgh, PA. (Gilchrist v. Gonsor (2004) 104 Ohio St. 3d 599, Syllabus).

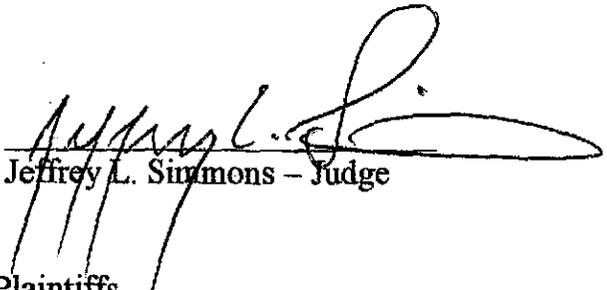
The Court notes that there is no suggestion that Charles Billingsley, the driver, was negligent and therefore no suggestion that Sherwin-Williams, the employer, was negligent. Accordingly, recovery is possible only through uninsured motorist coverage.

The Court finds that Defendant National Union Fire Insurance Company of Pittsburgh, PA. failed to comply with the statute and the requirements of Linko vs. Indemnity Ins. Co. of N. Am. (2000), 90 Ohio St. 3d 445.

The Court therefore finds there is no genuine issue as to any material fact and that Plaintiffs are entitled to judgment as a matter of law.

It is therefore ORDERED:

- (1) Plaintiffs' Motion for Partial Summary Judgment against National Union Fire Insurance Company of Pittsburgh, PA is hereby Granted.
- (2) Defendant National Union Fire Insurance Company of Pittsburgh, PA's Motion for Summary Judgment is hereby Denied.
- (3) Plaintiffs are entitled to uninsured motorist coverage up to \$2,000,000.00 under Defendant National Union Fire Insurance Company of Pittsburgh, PA's policies.
- (4) Upon further consideration, the Court finds there is no just cause for delay.
- (5) The Court finds this is a Final and Appealable order and the Clerk is directed to serve a copy of this entry upon all parties and all counsel.


Jeffrey L. Simmons - Judge

Distribution:

- (1) C. Russell Canestraro - Attorney for Plaintiffs
- (2) John P. Petro - Attorneys for Defendant United Ohio Insurance Company
- (3) Lorree L. Dendis - Attorney for Defendant United Ohio Insurance Company
- (4) Brian D. Spitz - Attorney for Defendant National Union Fire Insurance Co. of Pittsburg, PA
- (5) Wendy Sue Dunlap - Pro Se

IN THE COMMON PLEAS COURT, VINTON COUNTY, OHIO

Styrk Walburn, et al.,

Plaintiffs

vs.

Wendy Sue Dunlap, et al.,

Defendants

Case No. 03 CV 013006

VINTON COUNTY
CLERK OF COURTS

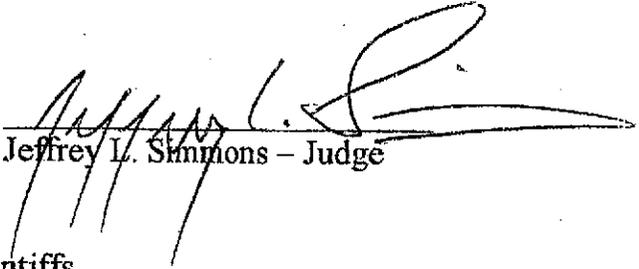
06 SEP 25 PM 3:07

FILED

ENTRY VACATING
AUGUST 28, 2006
JUDGMENT ENTRY

Upon reconsideration, the Court finds that the Court's Judgment Entry filed herein on August 28, 2006 is not a final, appealable order for the reason that the entry did not terminate the action (R.C. 2505.02).

Upon further consideration, the Court's August 28, 2006 Judgment Entry is hereby Vacated.


Jeffrey L. Simmons - Judge

Distribution:

- (1) C. Russell Canestraro - Attorney for Plaintiffs
- (2) John P. Petro
Lorree L. Dendis
Attorneys for Defendant United Ohio Insurance Company
- (3) Brian D. Spitz - Attorney for Defendant National Union Fire Insurance
Co. of Pittsburgh, PA
- (4) Wendy Sue Dunlap, Pro Se

Docketed / Jutis / Scanned

2-1988
RECEIVED
9-28-06

IN THE COMMON PLEAS COURT, VINTON COUNTY, OHIO

Styrk Walburn, et al.,

Plaintiffs

vs.

Wendy Sue Dunlap, et al.,

Defendants

Case No. 03 CV 01-006

VINTON COUNTY
CLERK OF COURT

05 AUG 28 AM 10:48

FILED

JUDGMENT ENTRY

This matter comes on for further consideration of Plaintiffs' Motion For Partial Summary Judgment filed April 2, 2004 and Defendant National Union Fire Insurance Company of Pittsburgh, PA's Motion for Summary Judgment filed April 2, 2004. The Court has considered said motions and supporting exhibits, memoranda in support of and contra to said motions, deposition of Styrk Walburn, stipulations, and the pleadings. The Court has also reviewed various supplemental authority submitted by the parties.

The pertinent facts may be summarized as follows.

- (1) On January 23, 2001 Plaintiff Styrk Walburn was a passenger in a motor vehicle he did not own and that was being driven by Charles Billingsley when there was a collision with a motor vehicle being driven by Defendant Wendy Sue Dunlap. Plaintiff alleges that

RECEIVED
8-30-06

2-1988

Defendant Dunlap was negligent, and that as a result of her negligence, Plaintiff sustained various personal injuries which required medical treatment.

- (2) Plaintiffs Styrk Walburn and Betty Walburn are husband and wife.
- (3) The accident occurred on State Route 93 in Vinton County, Ohio.
- (4) Defendant Wendy Sue Dunlap was uninsured with respect to the collision.
- (5) Plaintiffs were insured under a personal auto policy by Defendant United Ohio Insurance Company with uninsured motorist coverage up to \$200,000.00 per accident.
- (6) Plaintiff Styrk Walburn was in the scope and course of his employment with Sherwin-Williams Company and was a passenger in a motor vehicle owned by Sherwin-Williams at the time of the accident.
- (7) Sherwin Williams Company maintained an insurance program pursuant to a Deductible Indemnity Agreement with Defendant National Union Fire Insurance Company of Pittsburgh, PA which included the issuance of general liability, automobile liability, and umbrella liability policies.

(8) The issue presented by the cross motions for summary judgment is whether Plaintiff is entitled to uninsured motorist coverage under the National Union policies.

DISCUSSION:

The Supreme Court of Ohio has held that the uninsured motorist provisions of the former R.C. 3937.18 apply to fronting policies such as those included as a part of the Sherwin-Williams insurance program with Defendant National Union Fire Insurance Company of Pittsburgh, PA. (Gilchrist v. Gonsor (2004) 104 Ohio St. 3d 599, Syllabus).

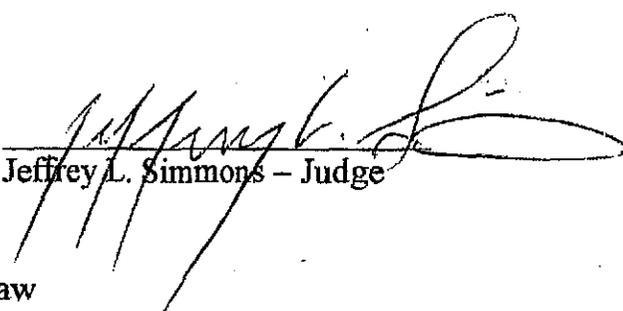
The Court notes that there is no suggestion that Charles Billingsley, the driver, was negligent and therefore no suggestion that Sherwin-Williams, the employer, was negligent. Accordingly, recovery is possible only through uninsured motorist coverage.

The Court finds that Defendant National Union Fire Insurance Company of Pittsburgh, PA. failed to comply with the statute and the requirements of Linko vs. Indemnity Ins. Co. of N. Am. (2000), 90 Ohio St. 3d 445.

The Court therefore finds there is no genuine issue as to any material fact and that Plaintiffs are entitled to judgment as a matter of law.

It is therefore ORDERED:

- (1) Plaintiffs' Motion for Partial Summary Judgment against National Union Fire Insurance Company of Pittsburgh, PA is hereby Granted.
- (2) Defendant National Union Fire Insurance Company of Pittsburgh, PA's Motion for Summary Judgment is hereby Denied.
- (3) Plaintiffs are entitled to uninsured motorist coverage up to \$2,000,000.00 under Defendant National Union Fire Insurance Company of Pittsburgh, PA's policies.
- (4) This is a Final and Appealable order. The Court finds there is no just cause for delay.


Jeffrey L. Simmons - Judge

Distribution:

- (1) C. Russell Canestraro - Attorney at Law
- (2) Brett A. Miller - Attorney at Law
- (3) Christopher J. Van Blargan - Attorney at Law
- (4) John P. Petro - Attorney at Law
- (5) Lorree L. Dendis - Attorney at Law
- (6) Wendy Sue Dunlap - Defendant
- (7) Brian D. Spitz - Attorney at Law

R.C. § 2505.02

Baldwin's Ohio Revised Code Annotated Currentness

Title XXV. Courts--Appellate

Chapter 2505. Procedure on Appeal (Refs & Annos)

Final Order

➔2505.02 Final order

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(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:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

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

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

(2007 S 7, eff. 10-10-07; 2004 H 516, eff. 12-30-04; 2004 S 80, eff. 4-7-05; 2004 S 187, eff. 9-13-04; 2004 H 292, eff. 9-2-04; 2004 H 342, eff. 9-1-04; 1998 H 394, eff. 7-22-98; 1986 H 412, eff. 3-17-87; 1953 H 1; GC 12223-2)

Civ. R. Rule 54

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Civil Procedure

▣ Title VII. Judgment

◆ Civ R 54 Judgments; costs

(A) Definition; form

"Judgment" as used in these rules includes a decree and any order from which an appeal lies as provided in section 2505.02 of the Revised Code. A judgment shall not contain a recital of pleadings, the magistrate's decision in a referred matter, or the record of prior proceedings.

(B) Judgment upon multiple claims or involving multiple parties

When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, 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. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(C) Demand for judgment

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded the relief in the pleadings.

(D) Costs

Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs.

(Adopted eff. 7-1-70; amended eff. 7-1-89, 7-1-92, 7-1-94, 7-1-96)