

IN THE SUPREME COURT OF OHIO

STYRK WALBURN, *ET AL.*,

Plaintiffs-Appellees,

v.

WENDY SUE DUNLAP, *ET AL.*,

Defendants,

and

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH,
PENNSYLVANIA,

Defendant-Appellant.

Case Nos. 2007-2150 & 2007-2302

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

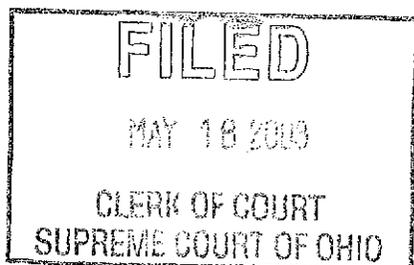
BRIEF AND APPENDIX OF APPELLEES,
STYRK AND BETTY WALBURN

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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]

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III.
STATEMENT OF THE CASE AND FACTS

On January 22, 2003 Plaintiff-Appellees Styrk and Betty Walburn ("Walburns") filed their complaint against Wendy Sue Dunlap ("Dunlap") Ohio Mutual Insurance Company, Cincinnati Insurance Company and National Union Fire Insurance Company of Pittsburgh, Pennsylvania (hereinafter "National Union"). The Walburn's sought recovery for injuries which Styrk Walburn suffered as a result of an automobile accident directly and proximately caused by Dunlap's negligence. Styrk Walburn was a passenger in a vehicle owned by his employer Sherwin Williams who had contracted with National Union for various insurance policies. (*Tr. R.1*).¹ Dunlap admitted in her answers that she was uninsured motorist under Ohio Law. (*Tr. R.5*) Further allegations of Walburns' include:

14. National Union issued an insurance policy bearing the policy number No. RM CA 320-88-30 to named insured, the Sherwin-Williams Company

15. The National Union Policy Provided Liability Coverage with a liability limit of two million dollars (\$2,000,000).

16. National Union attempted to obtain a rejection of uninsured/under insured 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 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/under insured

¹ "Tr. R." cites to the record of Vinton County Court of Common Pleas. *Walburn I R* Cites to the supplemental record of Vinton County Court of Appeals 06 CA 653. *Walburn II R* cites to the supplemental record of Vinton County Court of Appeals 06 CA 655; and Appx. cites to the Appendix to this brief.

motorist coverage, Plaintiffs have good grounds to believe the umbrella policies issued by Defendant National Union may also provided uninsured/under insured 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). (*Tr. R.5*)

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)."

Over four years ago, on March 31, 2004, the Walburns filed 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 policies issued to Sherwin-Williams. (*Tr. R.44A*) Approximately two and one-half years later, on August 28, 2006, the trial Court granted the Walburns' Motion for Partial Summary Judgment, finding the Walburns were entitled to UM/UIM coverage under the policies issued by National Union. The trial Court certified its order pursuant to Civil Rules 54(B) finding such order "is a final Appealable order and there is no just cause for delay." (*Tr. R. 90*) On September 12, 2006 National Union filed a motion for reconsideration which was opposed by the Walburns since such vehicle does not exist in the civil rules and is considered a nullity under existing case law. (*Tr. R. 92*)

At 9:19 a.m., on September 25, 2006 National Union filed its Notice of Appeal to the entry granting the Walburns partial summary judgment. (*Walburn II R.1*) The Fourth

On October 2, 2007, the Fourth District dismissed Case No. 06 CA 655, 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 06 CA 653 (*Walburn II R. 26*), National Union forfeited its right to proceed in 06 CA 655. (*Walburn II*). National Union additionally filed a motion to vacate the dismissal of *Walburn I* and by separate entry, the Fourth District also denied such motion holding that Civil Rule 60(B) does not apply to cases on appeal, and thus, it lacked authority to vacate its dismissal of Case No. 06 CA 653 (*Walburn I R. 10*)

On October 11, 2007, National Union filed a motion to certify its judgment as in conflict. (*Walburn II R. 28*) On November, 15, 2007, National Union filed an appeal (*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.

On December 3, 2007, the Fourth District granted National Union's Conflict Motion, (*Walburn II R. 31*) and, on December 12, 2007, National Union filed its Notice of Certified Conflict with this Court. On January 23, 2008, this Court agreed to hear the certified conflict, accepted appeal of the first and second propositions of law in Case No. 07-2150, and consolidated the certified conflict with this appeal. On February 20, 2008, this Court declined jurisdiction in Case Number 07-2140.

IV.
LAW AND ARGUMENT

Proposition Of Law No. I:

Appellant's Voluntary Dismissal Of Its Appeal Pending In the Fourth District Court of Appeals On September 26, 2006, Based On The False Assumption That The Trial Court's Grant Of Appellant's Reconsideration Motion Operated To Revest The Trial Court With Jurisdiction, Renders The Issues Certified By This Court Moot And, Accordingly, This Appeal Has Been Improvidently Allowed

Section 2(B)(2)(e), Article IV, of the Ohio Constitution provides that this Court "may" review "cases of public or great general interest." Full submission of the briefs, original papers and record in this appeal demonstrates that appellant made a fundamental error on September 26, 2006 which compels dismissal of this appeal as having been improvidently allowed. Accord *State v. Urbin* (2003), 100 Ohio St. 3d 1207, 797 N.E.2d 985 (Chief Justice Moyer concurring). On that date, one day after the trial Court vacated its earlier issuance of summary judgment on September 25, 2006, appellant voluntarily dismissed its pending appeal. And appellant dismissed its appeal after it had already appealed the trial Court's order based on its own request for reconsideration in the trial Court after appellant had already initiated its own appeal. Because the Ohio Rules of Civil Procedure **do not recognize reconsideration** in the Court of Common Pleas, appellant's dismissal of its appeal brings finality to the issue it is attempting to litigate here.

This Court has repeatedly held that a request for reconsideration at the trial Court level is "a nullity" and "a legal fiction" which does not suspend the time for filing a notice of appeal. *Pitts v. Dept. of Transportation* (1981), 67 Ohio St.2d 378, 379-381, 423 N.E.2d 1105, 1106-1107. Indeed, any judgment or final order that results from such a motion is a nullity itself.

Id. at 381, 423 N.E.2d at 1107. See, also, *Keyerleber v. Keyerleber*, Ashtabula App. No. 2007-A-0010, 2007-Ohio-3018, at ¶3 (notice of appeal filed on December 18, 2006 held untimely when final appealable order was issued in May 2006, not from reconsideration dated in November 2006). In *Pitts*, as here, this Court was confronted with the status and application of a motion for reconsideration filed in the trial Court which was filed **after** a final judgment. The issue was "further heightened" when "an appeal to the Court of Appeals was filed during the pendency of that same motion for reconsideration."²

Pursuant to App. R. 3(A) and 4(A), a notice of an appeal as of right must be filed with the clerk of the trial Court within thirty days of the judgment or final order from which the appeal is being taken. *State ex rel. Pendell v. Adams County Bd. of Elections* (1988), 40 Ohio St. 3d 58, 531 N.E.2d 713. Where a notice of appeal is not filed within the time prescribed by law, the reviewing court is without jurisdiction to consider issues that should have been raised in the appeal. See *State ex rel. Curran v. Brookes* (1943), 142 Ohio St. 107, 50 N.E.2d 995, paragraph seven of the syllabus; *Adkins v. Eitel* (1966), 8 Ohio St.2d 10, 221 N.E.2d 713.

Appellant's available remedies after the trial Court attempted to reconsider its summary judgment order included: (1) a request that the Court of Appeals remand the matter back to the trial Court [see, *State v. Henderson* (February 29, 1984), Hamilton App. Nos. C-830223 and C-830723, unreported (under proper circumstances, a Court of Appeals may remand a matter back to the Court of Common Pleas to "reinvest" that Court with jurisdiction); *Majnaric v. Majnaric* (1975), 46 Ohio App.2d 157, 347 N.E.2d 552 (where a motion to vacate a

² Only a Civ.R. 50(B) motion for judgment notwithstanding the verdict or a Civ.R. 59 motion for a new trial suspend the time for filing a notice of appeal. *Pitts*, at 381.

judgment is pending in the trial Court and an appeal is also pending from the same judgment, the appellant may move the appellate Court, for good cause, to remand the matter to the trial Court for a hearing on the motion to vacate); *State ex rel. Howard v. Lanzinger* (March 12, 1998), Lucas App. No. L-98-1067, unreported (when an appeal is perfected, the trial Court is divested, absent remand, of its authority to rule on substantive matters)]; or (2) a motion could have been filed for relief from judgment under Civ. R. 60(B). Accord *Reddy Electric Co. v. Thompson* (August 16, 2007), Clark App. No. 07 CA 33. In *Reddy*, just as in the subject case, a trial Court attempted to reconsider a matter after an appeal had been perfected. Appellant, Reddy Electric, did not dismiss its appeal, instead asking the Second District Court of Appeals to remand the matter back to the trial Court. The Second District preferred to have the Clark County Court of Common Pleas grant Civ. R. 60(B) relief, which was granted.³ After, and only after Civ. R. 60(B) relief was granted in the trial Court, did counsel for Reddy dismiss the matter.

In the instant case, the Court of Appeals for Vinton County properly held in its Decision and Entry dated October 2, 2007 that the August 28, 2006 trial Court entry terminated the action "with respect to National Union," and further, when National Union voluntarily dismissed its appeal, the right to appeal the trial Court's declaration of the Walburn's right to coverage ended. The appeal was, therefore, properly dismissed on October 2, 2007 and appellant's subsequent appeals to this Court were improvidently allowed.

³ For the Court's convenience, a copy of the August 16, 2007 Decision and Entry of the Second District Court of Appeals in *Reddy Electric Co. v. Thompson* is attached at page 36 of appellees' Appendix.

Proposition Of Law No.II:

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?

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]

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 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]

A. Appellant Is Judicially Estopped From Asserting That The Trial Court's Order Is Not Final And Appealable Under R.C. 2505.02(B)(2).

The doctrine of judicial estoppel "forbids a party "from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding." " *Griffith v. Wal-Mart Stores, Inc.* (C.A.6, 1998), 135 F.3d 376, 380, quoting *Teledyne Industries, Inc. v. Natl. Labor Relations Bd.* (C.A.6, 1990), 911 F.2d 1214, 1217, quoting *Reynolds v. Commr. of Internal Revenue* (C.A.6, 1988), 861 F.2d 469, 472-473. "Courts apply judicial estoppel in order to 'preserve[] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment.'" *Id.*, quoting *Teledyne* at 1218. "The doctrine applies only when a party shows that his opponent: (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court." *Griffith*, at 380. Cf. *Scioto Mem'l Hosp. Ass'n v. Price Waterhouse* (1996), 74 Ohio St.

3d 474, 481, 659 N.E.2d 1268 (judicial estoppel prevents a party from staking out a position in a subsequent action that is inconsistent with a position taken in a prior action).

In *Konstantinidis v. Chen* (C.A.D.C.1980), 200 U.S. App. D.C. 69, 626 F.2d 933, 938-939, the Court explained the doctrine of judicial estoppel, stating: "Judicial estoppel operates to prevent a party from insulting a court through improper use of judicial machinery. Thus, the concept's underlying rationale is that a party should not be allowed to convince unconscionably one judicial body to adopt factual contentions, only to tell another judicial body that those contentions were false. ****" *Id.* at 938-939.

The inconsistent action taken by National Union here when, on July 2, 2007, appellant filed a Civ.R. 60(B) motion in the Court of Appeals contending that the Civil Rules of Procedure were somehow applicable to the appellate process. But National Union also asserted, by making the motion, that the trial Court's judgment was a **final appealable order** since, by its very terms, Civ.R. 60(B) only applies to "final" judgments or orders. *Irion v. Incomm Electronics*, Highland App. No. 05CA1, 2006-Ohio-362.

Incredibly, appellant made its Civ.R. 60(B) argument (that a Court of Appeals could grant relief from judgment while exercising appellate jurisdiction), while citing a case (*Bobb v. Marchant* (1984), 14 Ohio St.3d 1, 469 N.E.2d 847) which arose as **an original action** in prohibition in the Court of Appeals. It is axiomatic that, while the Civil Rules do apply with limited breadth to original actions, which can, of course, be filed in a Court of Appeals, they are wholly inapplicable to appellate procedure. *State ex rel. Millington v. Weir* (1978), 60 Ohio App. 2d 348, 349, 397 N.E.2d 770, 772. Appellant's request for relief in its July 2, 2007 Civ.R. 60(B) motion is wholly inconsistent with its argument in this Court – that the trial Court's order was

interlocutory and not final. That request under Civ.R. 60(B) must bar its argument in this Court that the August 28, 2006 order of the Vinton County Court of Common Pleas was not final and appealable.

B. The Trial Court's Order In The Declaratory Judgment Was Rendered In A Special Proceeding Under R.C. 2505.02 And The Court Properly Designated Under Civ. R. 54(B) That There Was No Just Reason For Delay And, Therefore, The Order Affected A Substantial Right And Was Final And Appealable.

R.C. 2505.02(B) which defines "final orders" provides, in pertinent part, as follows:

(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;

* * *

Declaratory judgment actions are a special remedy not available at common law or at equity. 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. As stated by this Court in *General Acc. Ins. v. Ins. Co. of North America* (1989), 44 Ohio St.3d 17, 540 N.E.2d 266, a declaratory judgment action constitutes a special proceeding and rulings affecting substantial rights in such proceedings are generally final orders.

In *General Acc.*, *supra*, the trial Court issued an order declaring that an insurance company had no duty to defend. But the trial Court left undecided other pending issues. The

Ohio Supreme Court held that the order affected a substantial right and was made in a special proceeding (a declaratory judgment action), thus it fit into the R.C. 2505.02(B)(2) category of final orders. The Court then addressed Civ.R. 54(B) and found that since the order being appealed was final pursuant to R.C. 2505.02(B)(2) and it contained a "no just reason for delay" determination, it was immediately appealable despite the fact that other issues remained to be resolved by the trial Court.

It is not contended that the trial Court's August 28, 2006 partial summary judgment ruling did not affect a substantial right of the Walburns'. Accordingly, the trial Court's order would be a "final order" pursuant to R.C. 2505.02.

That, however, does not end the analysis. Because, as this Court stated in *General Acc., supra*, "upon a finding that this is a final order under R.C. 2505.02, we next must determine if Civ.R. 54(B) applies, and, if so, if its requirements were met." *Id.* The Court went on to hold in *General Acc., supra*, that even where an order may be final, "if a court enters final judgment as to some but not all of the claims and/or parties, the judgment is a final appealable order only upon the express determination [under Civ.R. 54(B)] that there is no just reason for delay." *Id.* Civ. R. 54(B) balances out the reluctance to allow piecemeal appeals with the acknowledgment that injustice sometimes will occur if a party has to wait for the disposition of the entire action before appealing.

The precise issue facing this Court was addressed by the Sixth District Court of Appeals in *Stewart v. State Farm Mutual Automobile Ins. Co.*, Lucas App. No. L-05-1285, 2005-Ohio-5740, wherein the Court stated:

Much of the confusion in this area of law is because an order determining coverage but not damages in declaratory judgment action

(a "special proceeding") is treated differently from a similar order in a "non-special proceeding" such as an ordinary breach of contract action or a case grounded in negligence. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 540 N.E.2d 266, makes it clear that with a Civ.R. 54(B) certification that there is no just reason for delay, an order in a declaratory judgment action finding that there is insurance coverage, but not addressing the amount of damages, is final and appealable under R.C. 2505.02(B)(2) since a declaratory judgment action is a special proceeding. **However, a similar order in a breach of contract case or an ordinary negligence action which establishes liability by finding that the contract was breached or that the defendant was negligent and that negligence was the proximate cause of the injury, but not awarding damages, is not final and appealable even if it contains a Civ.R. 54(B) no just reason for delay determination.** See, *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 ("As a general rule, even where the issue of liability has been determined, but a factual adjudication of relief is unresolved, the finding of liability is not a final appealable order even if Rule 54(B) language was employed."). This is because the order establishing liability in a non-special proceeding does not fit into any category of R.C. 2505.02. (Emphasis added.) *Id.* at ¶18.

Appellant's argument, and the cases it relies on, overlook the well-established precedent set forth in *General Acc.*, *supra*, *Stewart v. State Farm Mut. Auto. Ins. Co.*, and *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352, 354, 1993 Ohio 120, 617 N.E.2d 1136. The general purpose of Civ.R. 54(B) is to strike a reasonable balance between the policy against piecemeal appeals and the possible injustice sometimes created by the delay of appeals. *Alexander v. Buckeye Pipeline Co.* (1977), 49 Ohio St.2d 158, 359 N.E.2d 702.

In *Wisintainer v. Elcen Power Strut, Co.*, *supra*, this Court recognized the implicit authority of an appellate Court to strike a Civ.R. 54(B) certification. The Court ruled that a Civ.R. 54(B) finding is, in essence, a factual determination on whether an interlocutory appeal is consistent with interests of justice. *Id.* at paragraph one of the syllabus. This Court further stated that trial Courts enjoy the same presumption of correctness with regard to this finding that they

enjoy with any other factual findings and that such a finding "must stand" **if the record indicates the interests of sound judicial administration will be served by a finding of "no just reason for delay."** *Id.* at 355 and at paragraph two of the syllabus. (Emphasis added.)

The decision in *Wisintainer* was recently applied by the Franklin County Court of Appeals in *Whipps v. Ryan*, Franklin App. Nos. 07AP-231 and 07AP-232 , 2008-Ohio-1216. There, a decree of foreclosure and order of sale contained an express finding that there was no just reason for delay under Civ.R. 54(B). This phrase "is not a mystical incantation which transforms a nonfinal order into a final appealable order. Such language can, however, through Civ.R. 54(B), transform a final order into a final appealable order." (Citation omitted.) (*Id.* at ¶22.) *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352, 354, 1993 Ohio 120, 617 N.E.2d 1136. Continuing, the *Whipps* Court stated that "[a] trial Court's determination that 'there is no just reason for delay' is essentially a factual one, which an appellate court must not disturb where some competent, credible evidence supports the court's certification. (Citing *Wisintainer*, at 354-355.) "The paramount consideration to be made is whether the court's determination serves judicial economy at the trial level." *Id.* at 355. "[W]here the record indicates that the interests of sound judicial administration could be served by a finding of 'no just reason for delay,' the trial court's certification determination must stand." *Id.* at ¶22.

Here, the trial Court correctly determined under Civ.R. 54(B) that, in the interests of judicial economy, "there is no just reason for delay." The record and underlying facts fully support that reasoning. Judge Simmons correctly reasoned, given the existing *Linko v. Indemn. Ins. Co. of North America* (2000), 90 Ohio St. 3d 445, 2000 Ohio 92, 739 N.E.2d 338, insurance coverage issues, that it was necessary to issue a Civ.R. 54(B) order because, in the interests of

judicial economy, determination of the coverage issue will essentially determine the underlying case. Stated otherwise, if there is no coverage, the Walburns will not be pursuing further legal action in the Vinton County Common Pleas Court because Dunlap is "judgment proof."

In the interests of judicial economy, Judge Simmons correctly reasoned that judicial economies, as well as the enormous cost of litigation (including, but not limited to, medical experts for the Walburns' significant personal injuries, accident reconstruction experts, numerous depositions and other attendant discovery, as well as consideration for the Court's docket) mandated resolution of the insurance coverage question immediately, rather than later. "The paramount consideration to be made [in this appeal] is whether the court's determination serves judicial economy at the trial level." *Wisintainer v. Elcen Power Strut, Co., supra*, at 355. The record fully supports Judge Simmons' determination, which was made in the interests of "sound judicial administration and judicial economies. *Wisintainer, General Acc., Stewart and Whipps, supra*.

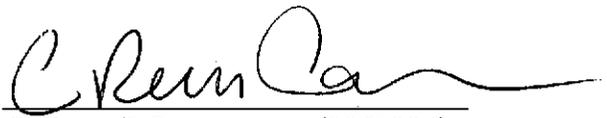
V. CONCLUSION

Based on the foregoing, the Walburn's respectfully request that the Court of Appeals decision be affirmed in all respects. The facts dictate that this appeal was improvidently allowed and dismissal is the only proper remedy to cure that determination. The issue has been brought to finality by National Union's own action of dismissing its appeal. National Union's subsequent appeal did not reinvest the Court of Appeals with jurisdiction since their prior dismissal made the trial Court's decision final and the rule of the case. National Union has shown little caution on taking multiple actions, not prescribed by law, and should not be rewarded because of their misguided and erroneous actions.

Alternatively, National Union should be judicially estopped in pursuit of this appeal since, on the face of their own pleadings, its has taken two diametrically opposed positions. It is impossible to advance the argument that the trial Court's order is both interlocutory and final, yet this is precisely what National Union has done with its subsequent appeal and its erroneous Civ.R. 60(B) motion. For this reason alone, this Honorable Court should dismiss this appeal.

In conclusion, the trial Court's order was proper since this action would benefit all of the parties by conserving resources since insurance coverage is and has always been the main issue in this suit. If coverage is not found for the Walburns, then this case will most likely be settled since the Defendant Dunlap is uninsured. Therefore, it was just and proper for the trial Court in the practice of judicial economy to frame the issue this way to enable the parties a swift and efficient manner in adjudicating this case.

Respectfully submitted,

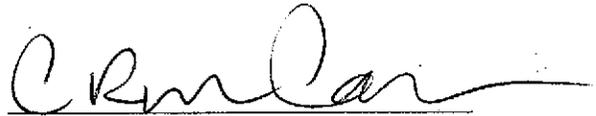
By: 
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Attorneys for Appellees,
Styrk and Betty Walburn

VI.
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Merit Brief of Appellees, Styrk and Betty Walburn, was served by regular U.S. Mail, postage prepaid, this 16th day of May, 2008, on Steven G. Janik, Esq., and Christopher Van Blargan, Esq., Janik, Dorman & Winter, L.L.P., 9200 South Hills Blvd., Suite 300, Cleveland, Ohio 44147, counsel for Appellant National Union Fire Insurance Company of Pittsburgh Pennsylvania; Wendy Sue Dunlap, 501 Pike Street, Apartment 2, Coal Grove, Ohio 45638; and John P. Petro, Esq., Williams and Petro Co. L.L.C., 338 South High Street, 2nd Floor, Columbus, Ohio 43215, counsel for Ohio Mutual Insurance Group.


C. Russell Canestraro

LEXSEE 2005 OHIO 5740

**Tamra Stewart, Appellee v. State Farm Mutual Automobile Ins. Co., et al.,
Appellant**

Court of Appeals No. L-05-1285

**COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, LUCAS
COUNTY**

2005 Ohio 5740; 2005 Ohio App. LEXIS 5174

October 26, 2005, Decided

PRIOR HISTORY: [**1] Trial Court No. CI-03-1420.

DISPOSITION: MOTION GRANTED.

COUNSEL: Jack G. Fynes, for appellee.

Cormac B. DeLaney and Stephen F. Ahern, for appellant.

JUDGES: Arlene Singer, P.J., William J. Skow, J., Dennis M. Parish, J., CONCUR.

OPINION

DECISION AND JUDGMENT ENTRY

PER CURIAM.

[*P1] Plaintiff-appellee, Tamra Stewart, has filed a motion to dismiss the appeal of defendant-appellant, State Farm Mutual Automobile Insurance Company, alleging that the order from which the appeal is taken is not final and appealable. Stewart has filed a memorandum in opposition. For the reasons that follow, the motion is found well-taken.

[*P2] The pertinent case history is that Stewart filed a complaint against State Farm seeking a declaration that she is entitled to underinsured motorist coverage under a State Farm Policy, asking for an award of damages for injuries that she sustained in an automobile accident and for attorney fees. Stewart had previously been paid the limits of the tortfeasor's insurance policy. State Farm filed a motion for summary judgment, alleging that Stewart is not entitled to underinsured coverage for various reasons. Stewart filed a motion for partial summary judgment [**2] on the issue of coverage, urging the court to declare that she does have underinsured motorist coverage under the

State Farm policy. On August 8, 2005, the court denied State Farm's motion for summary judgment and granted Stewart's motion for partial summary judgment, declaring that there is coverage but not addressing her claim for damages or attorney fees. State Farm filed this appeal².

1 It is clear from the record that Stewart filed this motion since State Farm responded to it and the trial court judge discusses it in his decision. However, the actual motion for summary judgment is not in the record of this case and there is no indication on the court's appearance docket that it was ever filed.

2 State Farm states that this appeal is taken from an order denying summary judgment, which is generally not appealable. However, the trial court judgment actually grants plaintiff's motion for partial summary judgment on the issue of coverage, so this is not an appeal from the denial of summary judgment.

[**3] [*P3] Stewart filed her motion to dismiss the appeal on the grounds that the August 8 order is not final and appealable because it determines coverage only but not the amount of damages and it does not contain a Civ.R. 54(B) determination that there is no just reason for delay. We agree.

[*P4] Analysis of the issue must begin with R.C. 2505.02, which defines what types of orders are final and appealable³. If an order is final under that code section, then we must determine whether Civ.R. 54(B) applies and, if so, whether its requirements are met. See *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 541 N.E.2d 64, syllabus, where the court states: "An order of a court is a final, appealable order only if the requirements of both Civ.R. 54(B), if applicable, and R.C. 2505.02 are met."

3 We note that the Ohio Revised Code contains some miscellaneous statutes that make specific types of orders final and appealable even if they do not fit into an R.C. 2505.02 category. See, for example, R.C. 2705.09 contempt orders, R.C. 2711.15 orders confirming, modifying, correcting or vacating an arbitration award, R.C. 2305.252 orders to produce records from peer review files under R.C. 2305.25, and R.C. 2744.02 orders denying alleged governmental immunity. We need not address this step in our analysis of this case.

[**4] [*P5] R.C. 2505.02 states, in pertinent part:

[*P6] "(A) As used in this section:

[*P7] "(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.

[*P8] "(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.

[*P9] "(3) * * *

[*P10] "(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:

[*P11] "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

[*P12] "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

[*P13] "(3) * * *."

[*P14] Civ.R. 54(B) states:

[*P15] "Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as [**5] 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."

[*P16] In the instant case, the order being appealed is covered by R.C. 2505.02(B)(2), "an order that affects a substantial right made in a special proceeding." See *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 540 N.E.2d 266. In that case, the trial court issued an order declaring that an insurance company had no duty to defend [**6] but left other issues unresolved. The Ohio Supreme Court held that the order affected a substantial right and was made in a special proceeding (a declaratory judgment action), thus it fit into the R.C. 2505.02(B)(2) category of final orders. The court then addressed Civ.R. 54(B) and found that since the order being appealed was final pursuant to R.C. 2505.02(B)(2) and it contained a "no just reason for delay" determination, it was immediately appealable despite the fact that other issues remained to be resolved by the trial court.

[*P17] In the present case, the court determined, in a declaratory judgment proceeding, that there is insurance coverage for plaintiffs injuries but it does not determine the amount of damages. However, unlike *General Accident* the trial court's order in our case does not contain a determination that there is no just reason for delay. Therefore, we find that the order cannot be appealed until Stewart's claim for damages for injuries that she sustained and for attorney fees have been adjudicated.

[*P18] Much of the confusion in this area of law is because an order determining [**7] coverage but not damages in declaratory judgment action (a "special proceeding") is treated differently from a similar order in a "non-special proceeding" such as an ordinary breach of contract action or a case grounded in negligence. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 540 N.E.2d 266, makes it clear that with a Civ.R. 54(B) certification that there is no just reason for delay, an order in a declaratory judgment action finding that there is insurance coverage, but not addressing the amount of damages, is final and appealable under R.C. 2505.02(B)(2) since a declaratory judgment action is a special proceeding. However, a similar order in a breach of contract case or an ordinary negligence action which establishes liability by finding that the contract was breached or that the defendant was negligent and that negligence was the proximate cause of the injury, but not awarding damages, is not final and appealable even if it contains a Civ.R. 54(B) no just reason for delay determination. See, *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 ("As a general rule, even

where [**8] the issue of liability has been determined, but a factual adjudication of relief is unresolved, the finding of liability is not a final appealable order even if Rule 54(B) language was employed." This is because the order establishing liability in a non-special proceeding does not fit into any category of R.C. 2505.02.

[*P19] The motion to dismiss is granted. This appeal is ordered dismissed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

MOTION GRANTED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Arlene Singer, P.J.

William J. Skow, J.

Dennis M. Parish, J.

CONCUR.

1 of 1 DOCUMENT

Edward F. Whipps, Trustee, Plaintiff-Appellee, v. James M. Ryan, and James M. Ryan, Trustee, Defendants-Appellants, v. Sky Bank, Defendant-Appellee. Sky Bank, Plaintiff-Appellee, v. Michael F. Colley, Defendant-Appellee, and James M. Ryan, Defendant-Appellant.

No. 07AP-231, No. 07AP-232

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY

2008 Ohio 1216; 2008 Ohio App. LEXIS 1054

March 18, 2008, Rendered

PRIOR HISTORY: [**1]

APPEALS from the Franklin County Court of Common Pleas. (C.P.C. No. 05CVH10-11685). (C.P.C. No. 06CVH01-1244).

DISPOSITION:

COUNSEL: Weltman, Weinberg & Reis Co., L.P.A., Stephen A. Santangelo, and Angela Coriell, for appellee Sky Bank.

Rhett A. Plank and Ira B. Sully, for appellant.

JUDGES: SADLER, J. McGRATH, P.J., and FRENCH, J., concur.

OPINION BY: SADLER**OPINION**

(REGULAR CALENDAR)

SADLER, J.

[*P1] These matters are before the court on appeal and a motion to dismiss the appeal. Defendants-appellants, James M. Ryan ("Ryan") and James M. Ryan, Trustee ("Ryan as Trustee"), appeal from the judgment of the Franklin County Court of Common Pleas, in which that court: (1) granted judgment against appellants and in favor of plaintiff-appellee, Sky Bank ("Sky"), on Sky's claims for money damages and for foreclosure of a mortgage, and (2) issued a Decree of Foreclosure and Order of Sale for the subject property.

[*P2] This case concerns several parcels of land located on East Main Street in Columbus ("the

property"). On November 9, 1990, Ryan and Michael F. Colley ("Colley"), executed a promissory note ("Note 1"), in favor of The Ohio Bank, Sky's predecessor-in-interest. The face amount of the note was \$ 130,000. [**2] Also on that date, Ryan and Colley executed another promissory note in favor of The Ohio Bank, with the face amount of \$ 570,000, but that note is not involved in this case.

[*P3] Also on November 9, 1990, Colley, Ryan, and Fred H. Pitz ("Pitz") signed an Open End Mortgage, Assignments of Rents and Security Agreement, which, by its express terms, secured the obligations under both November 9, 1990 notes, totaling \$ 700,000 of indebtedness, by granting a mortgage upon the property. This provided, inter alia, that the mortgage was:

TO SECURE TO LENDER (a) the repayment of the indebtedness evidenced by the Note, with interest thereon, and all renewals, extensions and modifications thereof; (b) the repayment of any future advances, with interest thereon, made by Lender to Borrower pursuant to Paragraph 29 hereof (herein "Future Advances"); (c) terms and conditions of the Commitment and Loan Agreement dated August 10, 1990; (d) the payment of all other sums, with interest thereon, advanced in accordance herewith to protect the security of this Instrument; and (e) the performance of the covenants and agreements of Borrower herein contained
* * * [.]

[*P4] Paragraph 29 of the mortgage, assignment, and [*3] security agreement provides:

FUTURE ADVANCES. Upon request of Borrower, Lender, at Lender's option so long as this Instrument secures indebtedness held by Lender, may make Future Advances to Borrower. Such Future Advances, with interest thereon, shall be secured by this Instrument when evidenced by promissory notes stating that said notes are secured hereby.

[*P5] On July 26, 2001, Colley and Ryan executed a promissory note ("Note 2"), in favor of Sky, with the face amount of \$ 400,000. That note provides, inter alia:

COLLATERAL. Borrower acknowledges this Note is secured by a Mortgage dated 11/09/90, recorded 11/09/90 in Vol. 16090, Page G08 of the Records of Mortgages in the Office of the Recorder of Franklin County, Ohio, property located at 185-195 E Main St, Columbus, Ohio 43215, an Assignment of Rents and Leases dated 11/09/90, recorded 11/09/90 in Vol. 16090, Page H06 of the Records of Mortgages in the Office of the Recorder of Franklin County, Ohio, property located at 185-195 E Main St, Columbus, Ohio 43215 all the terms and conditions of which are hereby incorporated and made a part of this Note.

[*P6] Effective November 9, 2001, Colley, Ryan, and Sky entered into a Change in Terms Agreement [*4] ("Agreement 1"), whereby the parties agreed to modify the terms of Note 1 by extending the loan term by 60 months, and lowering the interest rate. Effective December 26, 2003, Colley, Ryan and Sky entered into a second Change in Terms Agreement ("Agreement 2"), whereby the parties agreed to again modify the terms of Note 1 by providing for three months of interest-only payments, followed by resumption of regular principal-and-interest payments. On August 16, 2005, Colley apparently quitclaimed all of his interest in the subject property to Whipps, in trust; and Colley's wife, Nancy ("Mrs. Colley"), apparently quitclaimed to Whipps her dower interest in the property.

1 There is no evidence of these transfers in the record, but all parties seem to agree that Colley and Mrs. Colley indeed transferred their interests to Whipps in trust. This fact is not crucial to our disposition of this appeal, but we include it in order to provide a complete account of the facts underlying the case.

[*P7] On October 21, 2005, Whipps filed a partition action against Ryan and Ryan as Trustee. Whipps claimed to be the owner of an undivided one-sixth interest in the property. Ryan filed his answer on January [*5] 7, 2006, asserting the affirmative defense of failure to join an indispensable party, to wit: Colley. Ryan also asserted a counterclaim against Whipps, based upon improvements and payments respecting the property that allegedly benefited Whipps. Whipps replied to the counterclaim, denying the substantive allegations and asserting the affirmative defenses of estoppel, waiver, laches, and accord and satisfaction.

[*P8] On January 27, 2006, Sky filed an action for money damages against Colley and Ryan, alleging that they had defaulted on Note 1. Ryan filed an answer in which he generally denied the substantive allegations, and he asserted the affirmative defense of failure to join an indispensable party, to wit: Pitz. Colley filed an answer and a cross-claim against Ryan, alleging that Ryan breached an agreement whereby Ryan was to manage the property, collect rent, and pay expenses. Ryan answered the cross-claim, admitting to the management arrangement, but denying any breach. He also purported to assert a cross-claim against Colley in quantum meruit for management services.

[*P9] On February 7, 2006, Sky moved to intervene in the partition action, stating that Colley and Ryan were in default on [*6] Note 1, and on Agreements 1 and 2, the obligations of which were secured by a mortgage on the property subject of the partition action. Sky later amended its motion to include an allegation that Colley and Ryan were in default on Note 2 as well. Sky also moved to add various lienholders as defendants in the partition action. It also moved to add Carolyn Ryan ("Mrs. Ryan") as a party-defendant, by virtue of her partial ownership interest in the property. On April 25, 2006, the trial court granted Sky's motion to intervene and to add additional parties.

[*P10] On May 9, 2006, Sky answered Whipps' partition complaint, and filed a counterclaim against Whipps, and a cross-claim against Ryan, Ryan as Trustee, Mrs. Ryan, and the various other lienholders for foreclosure on the property, based upon Colley's and Ryan's default on Note 2. Sky alleged that it was owed a total of \$ 335,666.89, plus interest, on Note 2. On June 9,

2006, all but one of the lienholders that Sky added filed answers stating that they had no interest in the subject property and requesting that they be dismissed as parties.

[*P11] On July 6, 2006, Ryan, Ryan as Trustee, and Mrs. Ryan answered the cross-claim for foreclosure, asserting [**7] the affirmative defense of failure to join Colley, who, they alleged, was an indispensable party because he was an obligor on the notes. Ryan, Ryan as Trustee, and Mrs. Ryan also filed a third-party complaint against Colley, alleging that Colley was jointly liable as a joint maker of the notes. Colley answered the third-party complaint, denying generally the substantive allegations thereof.

[*P12] On August 3, 2006, Sky moved for consolidation of the partition/foreclosure action and its separate action for damages against Colley and Ryan for the default on Note 1. The trial court later granted that motion. Following consolidation, Sky moved for summary judgment on its counterclaim and cross-claim for foreclosure, and on its complaint for money damages on Note 1.

[*P13] Sky attached to its motion: the affidavit of Felix Melchor ("Melchor Affidavit") authenticating Sky's business records, copies of Notes 1 and 2 and Agreements 1 and 2, a copy of the Open End Mortgage, Assignment of Rents and Security Agreement, copies of payoff data on Notes 1 and 2, and a commitment for title insurance on the property. In his affidavit, Mr. Melchor stated that he had personal knowledge of the business records attached [**8] to his affidavit, including Notes 1 and 2, Agreements 1 and 2, and the mortgage, assignments, and security agreement. He averred that Colley and Ryan had defaulted on their obligations under both notes and both agreements, and that Sky had exercised its right to acceleration, and he stated the amounts due and owing under each note. In its motion for summary judgment, Sky argued that Pitz and Colley were not necessary or indispensable parties because the commitment for title insurance showed that neither of them held any ownership interest in the subject property. Sky agreed, however, that if Ryan could demonstrate that Pitz did own part of the subject property, it would add Pitz as a party-defendant.

[*P14] In their memorandum contra, Ryan, Ryan as Trustee, and Mrs. Ryan argued that Note 2 represented a new and separate loan and that, consequently, the mortgage upon which the foreclosure action was based did not in fact secure the obligations set forth in Note 2. Attached to the memorandum contra was Ryan's affidavit for support of this contention. In reply, Sky directed the court's attention to language within Note 2 and the mortgage that demonstrates that Note 2 memorialized a

"future advance" [**9] as that term is used in the mortgage, and that the mortgage therefore did secure the obligations of Note 2.

[*P15] By decision rendered March 16, 2007, the trial court granted Sky's motion for summary judgment. On April 19, 2007, the trial court journalized a Decree of Foreclosure and Order of Sale, in which the court granted judgment against Ryan and Colley on Sky's claim for money damages on Note 1, in the amount of \$ 72,023.25 plus interest. The court further ordered a judicial sale of the property, and found that there is due and owing on Note 2 the amount of \$ 335,666.89, plus interest and any sums advanced, to be paid out of the proceeds of the sale.

[*P16] The trial court later granted a motion to withdraw the property from sale pending this court's disposition of the present appeal. On August 27, 2007, after learning that Mrs. Colley had, in a divorce-related filing, alleged that her quitclaim deeds were void, Sky filed a motion to add Mrs. Colley as a party-defendant, which the trial court granted.

[*P17] Between the date upon which the trial court issued its decision granting summary judgment, and the date upon which it journalized its Decree of Foreclosure and Order of Sale, Ryan and Ryan as [**10] Trustee (hereinafter, "appellants"), filed a notice of appeal, and attached thereto the decision granting summary judgment. On April 8, 2007, Sky filed a motion to dismiss the appeal, arguing that this court lacked jurisdiction for lack of a final appealable order. The parties fully briefed the motion to dismiss. Later, Ryan and Ryan as Trustee supplemented the appellate record with the trial court's April 19, 2007 Decree of Foreclosure and Order of Sale. At oral argument, both parties agreed that the Decree of Foreclosure and Order of Sale is a final appealable order over which this court has jurisdiction. We note that Sky has not formally withdrawn its motion to dismiss. For the following reasons, we overrule that motion and will proceed to the merits of this appeal.

[*P18] Pursuant to Section 3(B)(2), Article IV of the Ohio Constitution, this court's appellate jurisdiction is limited to the review of *final* orders of lower courts. A trial court's order is final and appealable only if it meets the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *In re Adoption of M.P.*, Franklin App. No. 07AP-278, 2007 Ohio 5660, P15, citing *Denham v. New Carlisle* (1999), 86 Ohio St.3d 594, 596, 1999 Ohio 128, 716 N.E.2d 184. [**11] Section 2505.02(B) of the Ohio Revised Code defines a final order, in pertinent part, as follows:

(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[.]

[*P19] "For an order to determine the action and prevent a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court." *Natl. City Community Capital Corp. v. AAAA At Your Serv., Inc.*, 114 Ohio St.3d 82, 2007 Ohio 2942, 868 N.E.2d 663, P7. "A judgment entry ordering a foreclosure sale is a final, appealable order pursuant to R.C. 2505.02(B) if it resolves all remaining issues involved in the foreclosure. This includes the questions of outstanding liens, including what other liens must be marshaled before distribution is ordered, the priority of any such liens, and the amounts that are due the various claimants." *Davilla v. Harman*, Mahoning App. No. 06MA89, 2007 Ohio 3146, P18, discretionary appeal not allowed, 116 Ohio St. 3d 1412, 2007 Ohio 6140, 876 N.E.2d 969. [**12] Review of the Decree of Foreclosure and Order of Sale in this case reveals that it resolves all issues involved in the foreclosure, such as the liens that must be marshaled, the priority of those liens, and the amounts due to the claimants. It also grants judgment on Sky's claim for money damages for default of Note 1. As such, it constitutes a final, appealable order.

[*P20] This is true despite the fact that the money-damages action was consolidated with, and the foreclosure action is a counter- and cross-claim in, the partition action, which remains pending in the trial court. When cases are consolidated, they become "one single action subject to the requirements of Civ.R. 54(B) and R.C. 2505.02." *Gilligan v. Robinson*, Franklin App. No. 05AP-1028, 2006 Ohio 4619, P41. However, both the money-damages action and the foreclosure action are distinct and separate branches of the whole cause that was before the trial court. They involved separate legal issues, required proof of different facts, and provided for different relief than the partition action. Therefore, the trial court's judgment in effect determines those branches of the action and prevents a judgment with respect to the money-damages [**13] and foreclosure claims. *Ferraro v. B.F. Goodrich Co.*, 149 Ohio App.3d 301, 2002 Ohio 4398, 777 N.E.2d 282, P18. For this additional reason, then, the decree of foreclosure is a final order.

[*P21] The Decree of Foreclosure and Order of

Sale contains an express finding that there is no just reason for delay, pursuant to Civ.R. 54(B). This phrase "is not a mystical incantation which transforms a nonfinal order into a final appealable order. Such language can, however, through Civ.R. 54(B), transform a final order into a final appealable order." (Citation omitted.) *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St.3d 352, 354, 1993 Ohio 120, 617 N.E.2d 1136. A trial court's determination that "there is no just reason for delay" is essentially a factual one, which an appellate court must not disturb where some competent, credible evidence supports the court's certification. *Id.* at 354-355. "The paramount consideration to be made is whether the court's determination serves judicial economy at the trial level." *Id.* at 355. "[W]here the record indicates that the interests of sound judicial administration could be served by a finding of 'no just reason for delay,' the trial court's certification determination. [**14] must stand." *Id.* On the record before us, we find that competent, credible evidence demonstrates that an immediate appeal will serve the interest of judicial economy and thus supports the trial court's certification.

[*P22] For all of the foregoing reasons, we find that the order below is a final appealable order and, thus, we deny the motion to dismiss.

[*P23] We now proceed to determine the merits of appellants' appeal. We begin by noting that appellants' brief violates App.R. 16(A)(3) and (4) because it lacks a statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected, and it lacks a statement of the issues presented for review, with references to the assignments of error to which each issue relates. "Procedural rules adopted by courts are designed to promote the administration of justice and to eliminate undue delay." *Robinson v. Kokosing Constr. Co.*, Franklin App. No. 05AP-770, 2006 Ohio 1532, P6. "The necessity of compliance with these rules is not to be minimized. Nonetheless, courts prefer to resolve cases upon their merits rather than upon procedural default." (Citation omitted.) [**15] *State v. Wilson*, Franklin App. No. 05AP939, 2006 Ohio 2750, P7. Therefore, we will proceed to resolve the three assignments of error stated in the argument section of appellants' brief.

[*P24] Appellants advance three assignments of error, as follows:

FIRST ASSIGNMENT OF ERROR:

The Trial Court lacked subject matter jurisdiction of the Edward F. Whipps action for Partition of Real Estate and Intervener's Appellee's [sic] Cross Claim

and Counterclaim for Foreclosure due to Edward F. Whipps Trustee's and Intervener's failure to name necessary and indispensable parties; the proceedings, decisions and judgments of the Trial Court in consolidated Cases # 1244 and # 11685 are void ab initio and these should be dismissed.

SECOND ASSIGNMENT OF ERROR:

The Trial Court erred in granting Plaintiff's Motion for Summary Judgment and a Decree of Foreclosure and Sale ordering a Cognovit Judgment in the amount of \$ 72,023.25 plus interest, that there is due and owing a sum of \$ 335,666.89 plus interest, a finding that the conditions of the Mortgage have been broken and that the same has become Absolute and issued an Order of Sale to the Sheriff, without first reviewing the conditions of default and other terms of the Construction/Permanent Commitment [**16] and Loan Agreement dated August 10, 1990, * * * the Adjustable Rate Rider, and the General Assignment of Leases, Rents and Profit, all incorporated in and made part of the Notes and Mortgagee Documents.

THIRD ASSIGNMENT OF ERROR:

The Trial Court erred by granting a Decree of Foreclosure and Order of Sale in Case # 05 CVH 11685 as the Court lacked Subject Matter Jurisdiction due to the failure of Appellee/Sky Bank to name as parties in its complaint for Cross Claim and Counterclaim for Foreclosure all of the Property Owners of the property known as 185 thru [sic] 205 E. Main Street, Columbus Ohio and the Civil Action failed for lack of service of all property owners as named defendants within one year of filing the Complaint thus requiring dismissal by the Court. Ohio Civ. Rule 3(A) and Ohio Civ. Rule 4(E).

[*P25] We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 654 N.E.2d 1327.

Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion, [**17] and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the nonmoving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St. 3d 181, 183, 1997 Ohio 221, 677 N.E.2d 343. If the moving party has satisfied its initial burden under Civ.R. 56(C), then the nonmoving party has a reciprocal burden, outlined in Civ.R. 56(E), to set forth specific facts showing that there is a genuine issue for trial. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 1996 Ohio 107, 662 N.E.2d 264.

[*P26] Appellants' first and third assignments of error raise related issues and will be addressed together. First, appellants argue that the trial court lacked subject matter jurisdiction over the partition action because Whipps failed to join indispensable parties. But the partition action is not before this court on appeal; the only judgment subject to our review in this appeal is the Decree in Foreclosure and Order of Sale.

[*P27] Appellants maintain that the trial court lacked jurisdiction over the foreclosure action because Sky failed to join indispensable parties, or, alternatively, that the court should have dismissed the [**18] action because such parties were not named and served within one year of the commencement of Sky's foreclosure action. Specifically, appellants argue that Pitz is an indispensable party because he owns an interest in the property, that Pitz's wife is an indispensable party by virtue of a dower interest, and that Mully's Irish Tavern, Inc., is an indispensable party by virtue of its status as a lessee that has invested funds in improvements to the property. Appellants also maintain that Colley is an indispensable party because of his "probable ownership interest." 2

2 Brief of Appellants, at 15.

[*P28] First, as Sky points out in its brief, appellants never raised this issue in their memorandum contra to Sky's motion for summary judgment. Second, and more importantly, appellants point to no evidence in the record that any of these persons own any interest in the property. Appellants have included copies of various deeds in the appendix to their brief, but these documents are not found in the record of the proceedings before the trial court and, therefore, we cannot consider them. Our review on appeal is limited to those materials in the

record before the trial court. [**19] *Galloway v. Khan*, Franklin App. No. 06AP-140, 2006 Ohio 6637, P49, discretionary appeal not allowed, 113 Ohio St. 3d 1490, 2007 Ohio 1986, 865 N.E.2d 914.

[*P29] Finally, the record reflects that the named defendants in Sky's complaint for money damages, Colley and Ryan, were both served with the summons and a copy of the complaint; and the defendants in Sky's counterclaim/cross-claim for foreclosure, Whipps, Ryan, and Ryan as Trustee, were all served with Sky's counterclaim/cross-claim. Sky obtained service upon all parties within the time constraints of Civ.R. 3(A) and 4(E).

[*P30] For all of the foregoing reasons, appellants' first and third assignments of error are overruled.

[*P31] In support of their second assignment of error, appellants argue that the trial court erred in granting summary judgment without reviewing a "Construction/Permanent Commitment and Loan

Agreement," and "Adjustable Rate Rider" and a "General Assignment of Leases, Rents and Profit," purported copies of which they include in the appendix to their brief. Appellants never raised this issue below, and these documents are not contained in the record. Thus, again, we may not consider them in performing our review of the trial court's grant of summary judgment. [**20] Indeed, appellants acknowledge, at page 19 of their brief, and again at page 23, that these documents were never placed in the record before the trial court. It is elementary that a trial court does not err in failing to consider evidence that was never presented to it. For these reasons, appellants' third assignment of error is overruled.

[*P32] Appellants' first, second, and third assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Motion to dismiss denied; judgment affirmed.

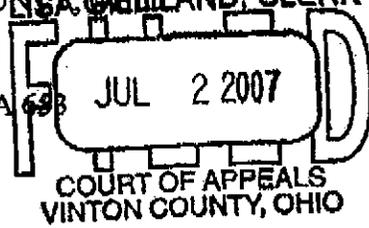
McGRATH, P.J., and FRENCH, J., concur.

ORIGINAL

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

STYRK WALBURN, et al.,)
)
 Plaintiffs-Appellees,)
)
 v.)
)
 WENDY SUE DUNLAP, et al.,)
)
 Defendants-Appellants.)

App. No. 06 CA 693



Appeal from the Court of Common Pleas for
Vinton County, Ohio
Case No. 03 CV 01-006

**MOTION OF DEFENDANT-APPELLANT NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA TO VACATE COURT'S
OCTOBER 4, 2006 ENTRY DISMISSING APPEAL AND
FOR REINSTATEMENT TO THE ACTIVE DOCKET**

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Pursuant to Civil Rule 60(B)(1), Civil Rule 60(B)(5) and other applicable authority, Defendant-Appellant National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") respectfully moves this Court to vacate its October 4, 2006 Entry dismissing this appeal, and for reinstatement of this case to the Court's active docket. As grounds for this motion, National Union states that the appeal was dismissed as a result of mistake, error and/or omission, and that order dismissing the case should be vacated to avoid manifest injustice. The grounds for this motion are set forth more fully below.

On August 28, 2006 the Court of Common Pleas for Vinton County, Ohio granted Plaintiff-Appellants' Motion for Partial Summary Judgment, holding that Plaintiff-Appellees were entitled to uninsured/underinsured motorist coverage under policies issued by National Union to Styrk Walburn's employer. The trial court's decision did not resolve all of the coverage issues raised or the issue of damages, but nevertheless included the phrase "no just cause for delay." On September 12, 2006, National Union filed a motion for reconsideration of the court's decision. On September 22, National Union mailed its notice of appeal, which was filed on September 25, 2006 at 9:19 a.m. However, the Vinton County Clerk of Courts issued a Deficiency Notice to National Union in which it stated:

DEFICIENCY NOTICE

* * *

Please be advised that the Court of Appeals has directed that you be advised that your appeal *is not properly perfected* for the reasons checked below.

* * *

XXXXXXXXXX

Notice of Appeal not accompanied by written order from you to the Court Reporter, not the Clerk of Courts, that a complete or partial transcript of proceedings has

been requested as required by Ohio Appellate Rule 9.
(OR)

~~XXXXXXXXXX~~

Notice of Appeal not accompanied by a designation setting forth proposed assignments of error, if partial transcript has been ordered, no transcript is required or an alternative no transcript will be filed as required by Ohio Appellate Rule 9.

(*Emphasis added*). At 3:07 p.m. that same day, the trial court filed a judgment entry granting National Union's motion for reconsideration and vacating its August 28, 2006 judgment entry.

On September 28, 2006, believing that it had not perfected its appeal, and that the trial court's September 25, 2006 judgment entry rendered the appeal moot, National Union requested that the Court dismiss its appeal. National Union attached a copy of the trial court's September 25, 2006 entry to its motion to dismiss.

Plaintiff-Appellees did not oppose National Union's motion, and on October 4, 2006, this Court exercised its discretion and dismissed the appeal.

On October 23, 2006, Plaintiff-Appellees' counsel drafted and signed a joint motion to set a pretrial with the trial court in order "to address submitted dispositive motions." Thus, it is clear that the parties and the trial court believed that the previously submitted dispositive motions were still pending, and that the trial court was authorized to rule on them.

On December 12, 2006, the trial court again granted Plaintiff-Appellees' Motion for Partial Summary Judgment, issuing a judgment entry almost identical to its order of August 28, 2006. On December 27, 2006, National Union filed a timely appeal of the trial court's December 12, 2006 judgment entry, which is currently pending before this Court as *Walburn v. Dunlap*, Vinton Appellate No. 06 CA 655.

Nearly four months after the parties completed briefing in Case No. 06 CA 655, this Court issued a judgment entry in which it *sua sponte* questioned whether the trial court had

jurisdiction to vacate its August 28, 2006 judgment entry in light of the notice of appeal filed earlier that day, and thus, whether National Union's December 27, 2006 appeal was timely. This Court further ordered National Union to submit a memorandum in support of jurisdiction, which National Union has filed contemporaneously with this Motion.

In the event this Court finds National Union's grounds for jurisdiction in Case No. 06 CA 655 are without merit, National Union moves this Court, in the alternative, to vacate its October 4, 2006 Entry in the present appeal, and for reinstatement to the Court's active docket.

Ohio courts have vacated dismissals of appeals where the dismissals have resulted from errors or omissions or where allowing the dismissals to stand would result in manifest injustice. *Bobb v. Marchant* (1984), 14 Ohio St.3d 1, 469 N.E.2d 847; *Phillips v. Provident Life & T. Co.* (Ohio Cir. Dec. 1910), 32 Ohio C.D. 155, 42 Ohio C.C. 155, 17 Ohio C.C.(N.S.) 298, 1910 WL 733.

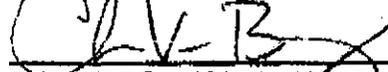
In *Bobb*, the court of appeals dismissed an appeal based upon its mistaken belief that the appeal was moot. The appellant filed a motion to vacate the court of appeal's order dismissing the case, which the court of appeals denied. The Supreme Court of Ohio concluded that court of appeals erred in denying the appellant's motion to vacate, finding that:

The court of appeals dismissed the complaint on the ground of mootness. It of course was not moot, because the [trial] was not held. Once this fact was brought to the attention of the court of appeals, it should have granted relief from its earlier dismissal pursuant to the 'other reason' provision of Civ.R. 60(B)(5).

Here, as in *Bobb*, the appeal was dismissed based upon the mistaken belief of the parties and this Court that the appeal was moot following the trial court's vacation of its August 28, 2006 judgment entry granting Plaintiff-Appellants' Motion for Partial Summary Judgment.

Accordingly, National Union respectfully requests that this Court vacate its October 4, 2006
Entry dismissing the case, and reinstate this appeal on its docket.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The foregoing has been served upon the following via ordinary U.S. Mail, postage prepaid,
on this 30th day of June, 2007:

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Pittsburgh, PA.

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

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).

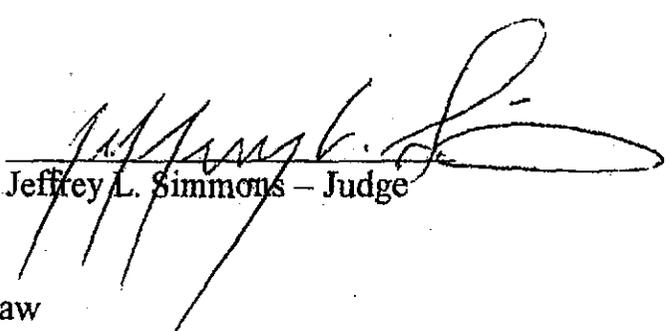
The Court notes that there is no suggestion that Charles Billingsley, the driver, was negligent and therefore no suggestion that Sherwin-Williams, the employer, was negligent. Accordingly, recovery is possible only through uninsured motorist coverage.

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

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

REDDY ELECTRIC CO., :
Plaintiff-Appellant, : C.A. CASE NO. 07-CA-33
v. : T.C. NO. 07-CV-170
TERRY L. THOMPSON, :
Defendant-Appellee. :

DECISION AND ENTRY
August 16, 2007

PER CURIAM:

On May 21, 2007, Reddy Electric Co. and Terry Thompson filed a joint motion for remand, requesting this Court to remand the matter to the trial court so that the court could consider the merits of the underlying claim.

The procedural posture of this case is as follows.

On February 6, 2007, Reddy Electric filed this action against Thompson seeking money paid to Thompson outside of the workers' compensation system. On March 6, 2007, Thompson sought dismissal of the action pursuant to Civ.R. 12(B)(1). Although Reddy Electric had until March 26, 2007 to respond to the motion, the trial court granted the motion

to dismiss on March 22, 2007. On March 30, 2007, Reddy Electric filed a motion for reconsideration of the dismissal. On April 20, 2007, while the motion for reconsideration was pending, Reddy Electric filed a notice of appeal of the judgment of dismissal order. On April 24, 2007, the trial court granted the motion for reconsideration and vacated its dismissal of the case.

In their joint motion for remand, the parties express a desire to allow the trial court to proceed to adjudicate the underlying claim. They acknowledge, however, that "the trial [c]ourt appears to have lacked jurisdiction to have reconsidered its March 22, 2007 dismissal[.]" Nevertheless, they seek a remand to the trial court so that the trial court can consider the merits of the claim.

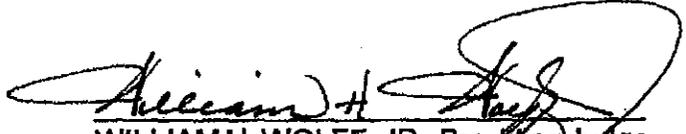
As recognized by the parties, a motion for reconsideration of a final judgment is a legal nullity. *Pitts v. Ohio Dept. Of Transp.* (1981), 67 Ohio St.2d 378, 21 O.O.3d 238, 423 N.E.2d 1105. Accordingly, despite the trial court's purported grant of the motion for reconsideration and vacation of the dismissal, the case remains, at this juncture, dismissed. Consequently, we cannot remand the matter to the trial court for consideration of the merits of that action.

The proper vehicle for "reconsideration" of a dismissal is a motion for relief from judgment pursuant to Civ.R. 60(B). Because the parties jointly desire for this case to proceed in the trial court, we grant the parties' request for a remand to provide Reddy Electric with an opportunity seek Civ.R. 60(B) relief in the trial court.

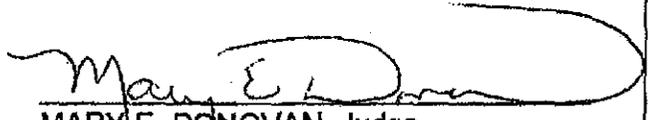
Reddy Electric shall provide this Court with a copy of the trial court's ruling on its motion within seven days of the trial court's ruling. If the trial court grants the motion, Reddy Electric shall file a motion to voluntarily dismiss this appeal in conjunction with a copy of the

trial court's order. This appeal will be held in abeyance pending notification by Reddy Electric to this Court of the outcome of its Civ.R. 60(B) motion.

SO ORDERED.


WILLIAM H. WOLFF, JR., Presiding Judge


MIKE FAIN, Judge


MARY E. DONOVAN, Judge

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