

**IN THE SUPREME COURT OF OHIO**

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

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

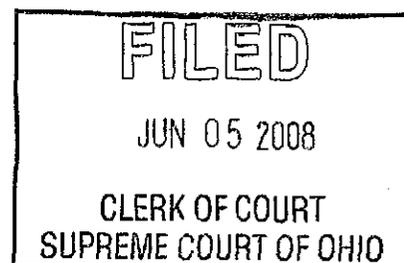
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## INTRODUCTION<sup>1</sup>

The Walburns fail to respond to National Union's argument, as well as the national majority view that the Trial Court's August 28, 2006 interlocutory order was neither final nor appealable. This alone justifies this Court's reversal of the Fourth District's October 2, 2007 decision. Nor should this Court entertain the arguments actually made by the Walburns, as:

- This appeal is properly before this Court;
- Pleading in the alternative does not give rise to judicial estoppel;
- This Court should not defer to the Trial Court's legal determination that its August 28, 2006 interlocutory order was final;
- *General Accident* does not control because that case involved a stand-alone declaratory judgment action; and
- *Stevens* controls this case.

For these reasons, National Union respectfully submits that the Fourth District's October 2, 2007 decision should be reversed, and this matter remanded to the Trial Court for further proceedings consistent with this Court's opinion. In the alternative, if this Court concludes that the Trial Court's August 28, 2006 interlocutory order was final and appealable, National Union respectfully submits that fundamental fairness and substantial justice require reinstatement of its appeal in *Walburn I*, such that this case should be remanded to the Fourth District with instruction to hear *Walburn I* on its merits.

### THIS APPEAL IS PROPERLY BEFORE THIS COURT

The Walburns argue that this appeal was improvidently allowed, relying upon *State v. Urbin* (2003), 100 Ohio St.3d 1207, 2003-Ohio-5549, 797 N.E.2d 98. This reliance is misplaced. In *Urbin*, Chief Justice Moyer concurring, the appeal was improvidently allowed

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<sup>1</sup> National Union will use the same abbreviations in its Reply Brief that it used in its Merit Brief.

because “full merit briefing and oral argument have revealed that the appellant waived the primary legal proposition he now presents.” *Id.* at ¶ 3. Here, by contrast, the record clearly demonstrates that National Union challenged the Trial Court’s Civil Rule 54(B) certification at every level of this case, including its Motion to Certify Conflict, Memorandum in Support of Jurisdiction and Merit Brief filed with this Court, and thus, has not waived “the primary legal proposition [it] now presents.”

The remainder of the Walburns’ argument focuses upon whether a motion for reconsideration tolls the time for appeal.<sup>2</sup> This issue, however, is not before this Court. National Union has never asserted that its Motion to Reconsider tolled the time for appeal. Instead, National Union challenges the Fourth District’s decision that the Trial Court’s certification was proper; an issue this Court clearly has jurisdiction to decide. *See, e.g., Page v. Preisser* (8th Cir. 1978), 585 F.2d 336, 338 (allowing challenge of Civil Rule 54(B) certification after expiration of appeal period because, if certification was improper, there was no final order to appeal); *Kuhre v. Goodfellow* (Utah App. 2003), 69 P.3d 286, 289 (late appeal allowed because Civil Rule 54(b) certification was inadequate); *Keith v. Kinney* (Colo. App. 1997), 961 P.2d 516, 519-520 (party who dismissed appeal of an interlocutory order allowed to challenge certification of that order in a subsequent appeal); *Pioneer Operations Co., Inc. v. Brandeberry* (Kan. App. 1990), 789 P.2d 1182, 1185 (party could challenge certification of order granting partial

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<sup>2</sup> The Walburns take issue with the fact that National Union filed a Motion for Reconsideration instead of a Civil Rule 60(B) Motion to Vacate. The Walburns’ argument ignores the fact that National Union argued that the Trial Court’s order was not final and appealable, in which case a Motion for Reconsideration was appropriate because there was no final, appealable order that was subject to a Civil Rule 60(B) Motion. However, even if the Walburns are technically correct, the issue is a red herring because courts will construe a Motion for Reconsideration as a Civil Rule 60(B) Motion where justice requires. *Fredebaugh Well Drilling, Inc. v. Brower Contracting*, 11<sup>th</sup> Dist. No. 2004-A-061, 2005-Ohio-6084, at ¶ 14.

judgment entry in subsequent, timely appeal even though it had not filed a timely appeal of the partial judgment entry).

Finally, the Walburns conclude that this appeal was improvidently granted because they will win on the merits. This faulty, circular argument begs the ultimate question, *i.e.*, whether in fact the order was final and appealable. If this argument is accepted, this Court would never consider the appealability of an order, but would simply go to the underlying merits. Clearly this argument is not well taken as this Court has jurisdiction to hear issues of appealability; jurisdiction which it has, in fact, exercised in the past. *See, e.g. General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 540 N.E.2d 266; *Stevens v. Ackman*, 91 Ohio St.3d 182, 2001-Ohio-249, 743 N.E.2d 901

In sum, the Walburns' argument that appeal was improvidently granted not only ignores this Court's decision accepting jurisdiction, but also the Fourth District's decision certifying conflict to this Court. Such collateral attacks on this Court's jurisdiction should be summarily rejected.

**PLEADING IN THE ALTERNATIVE DOES GIVE  
RISE TO JUDICIAL ESTOPPEL**

Contrary to the Walburns assertion, National Union has never admitted that the Trial Court's August 28, 2006 interlocutory order was final and appealable as to be properly certified.<sup>3</sup> Rather, it is absolutely clear from the record that National Union challenged the Trial Court's

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<sup>3</sup> Specifically, the Walburns claim that National Union's citation to Civil Rule 60(B) in its Motion to Vacate constitutes an admission that the August 28, 2006 interlocutory order was final and properly certified because the rule only applies to final, appealable orders. The Walburns fail to mention, however, that National Union relied on several theories in support of its Motion, including a court of appeals' inherent power to vacate its own mandates in the interest of justice. [*Walburn I R. 7, 9*]

certification throughout these proceedings, and filed its Motion to Vacate only “*in the event*” the Fourth District reached an adverse conclusion. [*Walburn I R. 7*]

Seeking relief in the alternative does not give rise to judicial estoppel, particularly where such relief is denied as it was in the present case. *Advanced Analytics Laboratories*, 148 Ohio App.3d 440, 2002-Ohio-3328, at ¶ 37, 773 N.E.2d 1081 (the doctrine of judicial estoppel may only be applied where a party successfully makes an inconsistent assertion in a prior proceeding); *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp.* (7<sup>th</sup> Cir. 1990), 910 F.2d 1540, 1548 (judicial estoppel only precludes alternative pleading after a party prevails on the basis of an inconsistent position); *Barringer v. Baptist Healthcare of Oklahoma* (Okla. 2001), 22 P.3d 695, 699-700 (judicial estoppel does not preclude alternative pleading unless a party has been successful in arguing an inconsistent position). Thus, the Walburns’ argument on judicial estoppel amounts to nothing more than the “cynical gamesmanship” they feign to protest. [Appellee’s Merit Brief at p. 8].

**THIS COURT SHOULD NOT DEFER TO THE TRIAL COURT’S LEGAL DETERMINATION THAT ITS AUGUST 28, 2006 INTERLOCUTORY ORDER WAS FINAL**

The Walburns’ assertion that this Court must defer to the Trial Court’s decision certifying its August 28, 2006 interlocutory order is fundamentally flawed because it fails to recognize that the Trial Court was first required to determine the threshold legal issue of whether its order was final before reaching the factual issue of whether there was no just cause for delay. *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 354, 1993-Ohio-120, 617 N.E.2d 1136, 1138.<sup>4</sup> As National Union challenges the Trial Court’s threshold legal determination that its order was final, and as the Trial Court’s legal determinations are not afforded deference, this Court’s review is *de*

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<sup>4</sup> The Walburns’ reliance on *Whipps v. Ryan*, 10<sup>th</sup> Dist. Nos. 07AP-231 and 07AP-232, 2008-Ohio-1216 is misplaced as that case follows *Wisintainer*.

*novo*. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313, 1996-Ohio-393, 667 N.E.2d 949, 952 (on appeal, a lower court's legal determinations are reviewed *de novo*).

**GENERAL ACCIDENT DOES NOT CONTROL BECAUSE THAT CASE INVOLVED A STAND-ALONE DECLARATORY JUDGMENT ACTION**

The Walburns' reliance on *General Acc. Ins. Co. v. Insurance Co. of North America*, (1989), 44 Ohio St.3d 17, 540 N.E.2d 266 is misplaced because *General Accident* involved a stand-alone declaratory judgment action in which the court's declaration of no coverage resolved all of the insurance issues before it.

In *General Accident*, General Accident Insurance Company ("General Accident") and Insurance Company of North America ("INA") settled a negligence claim brought by Bethlehem Steel Corporation against their insured, McKee-Otto. General Accident subsequently brought an action against INA seeking a declaration that INA was required to defend and indemnify McKee-Otto in the negligence action. INA filed a counterclaim in which it asserted that it had no duty to defend or indemnify and sought recoupment of the amount it had contributed to settlement. The parties filed cross-motions for partial summary judgment on the duty to defend. The Court of Common Pleas for Cuyahoga County, Ohio granted INA's motion for summary judgment and General Accident appealed to the Eighth District. INA filed a motion to dismiss the appeal for want of jurisdiction which the Eighth District granted without opinion.

This Court reversed the Eighth District, and concluded that the Court of Common Pleas's order was final and appealable because in ruling that INA did not owe McKee-Otto a duty to defend, it also disposed of General Accident's indemnity claim, thereby resolving all insurance issues raised in General Accident's declaratory judgment action. Thus, *General Accident* dealt with a declaratory judgment that determined all insurance issues by "independent judicial

inquiry” on a stand-alone basis. and prevented judgment in General Accident’s favor. *Stevens v. Ackman*, 91 Ohio St.3d 182, 190, 2001-Ohio-249, 743 N.E.2d 901

Unlike *General Accident*, the Trial Court’s August 28, 2006 interlocutory order in this case does not dispose of the Walburns’ claim against National Union because the Trial Court never addressed the coverage issue of whether the Walburns were “legally entitled to recover as compensatory damages from [Dunlap]” as required under National Union’s commercial automobile policy and R.C. § 3937.18. As this issue, as well as the issue of the Walburns’ damages remain unresolved, the Trial Court’s August 28, 2006 interlocutory order did not resolve all insurance issues on a stand-alone basis. As such, *General Accident* is clearly distinguishable from the present case and not controlling.<sup>5</sup>

### **STEVENS CONTROLS**

*Stevens v. Ackman*, 91 Ohio St.3d 182, 2001-Ohio-249, 743 N.E.2d 901, rather than *General Accident*, controls whether the Trial Court’s August 28, 2006 order was final under R.C. § 2505.02(B), as in *Stevens*, like the present case, issues of liability and damages were inextricably intertwined.

In *Stevens*, the Estate of Corey Banks (“Banks”) brought a wrongful death claim against several defendants including the City of Middletown. Middletown sought partial summary judgment, claiming it was entitled to immunity, which the Court of Common Pleas for Butler County, Ohio denied. Middletown appealed this interlocutory order to the Twelfth District prior

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<sup>5</sup> The Walburns also rely upon the Sixth District’s decision in *Stewart v. State Farm Mut. Auto. Ins. Co.*, 6<sup>th</sup> Dist. No. L-05-1285, 2005-Ohio-5740. However, the Sixth District never reached the issue of whether the Trial Court’s order was final and appealable because the order was not certified pursuant to Civil Rule 54(B). In *dicta*, the Sixth District cited *General Accident* for the general proposition that an action for declaratory judgment is a special proceeding, but did not consider this Court’s decision in *Stevens*, and failed to discuss the difference between stand-alone declaratory judgment actions and actions seeking damages in addition to a declaration of rights.

to adjudication of the remaining issues on liability and damages. Banks moved to dismiss the appeal for want of jurisdiction, but the Twelfth District denied this motion, holding that the interlocutory order was rendered in a special proceeding and affected a substantial right, and thus was a final, appealable order pursuant to R.C. § 2505.02(B) and Civil Rule 54(B).

This Court reversed the Twelfth District's decision and held that the nature of the underlying action, rather than its causes of action, must be the focus of a court's inquiry when determining whether an order is final and appealable. *Id.* at 187, 743 N.E.2d at 906. This Court further concluded that, while the case included statutory claims for wrongful death and survival, it was nonetheless akin to a personal injury action, and therefore, should be construed as an ordinary civil action seeking damages for purposes of R.C. § 2505.02(B)(2).. This Court explained:

Our conclusion that an order denying a motion for summary judgment in a civil action for damages involving a wrongful death is not an order entered in a special proceeding for purposes of R.C. 2505.02(B)(2) offers some consistency in an area of law that is frequently fraught with inexplicable discrepancies. It would be anomalous to hold that such an order would not be a final order in a case involving a personal injury, but would be one in a case involving a wrongful death, when the actions are so similar and are conducted procedurally in much the same manner. If a particular order is not appealable in a personal injury case, the same order should not be appealable in a wrongful-death case. ***We emphasize that, to qualify as a special proceeding, a particular proceeding must have the characteristics that indicate that an independent judicial inquiry is taking place.***

*Id.* at 190 (*emphasis added*).

Stevens has been properly extended by Ohio's appellate courts to declaratory judgment actions in which the declaration of rights is part of, and inextricably intertwined with, the plaintiffs' underlying claim for damages. *See, e.g., Meeker R & D, Inc. v. Evenflo Co., Inc.*, 11<sup>th</sup> Dist. App. No. 2006-P-0019, 2006-Ohio-3885, at ¶¶ 9, 10 (if a declaratory judgment claim is

asserted within the context of an ordinary civil action for breach of contract, it is the underlying action which governs our analysis); *Ohio and Vicinity Regional Council of Carpenters v. McMarty*, 11<sup>th</sup> Dist. App. No. 2005-T-0063, 2006-Ohio-2019, at ¶¶ 10-12 (where underlying action is for breach of contract, judgment does not become final and appealable merely on the basis of being “cast in the form of a declaratory judgment”); *Regional Imaging Consultants Corp. v. Computer Billing Services, Inc.*, 7<sup>th</sup> Dist. No. 00 CA 79, 2001-Ohio-3457, at 6.

Moreover, extension of *Stevens* to declaratory judgment actions is consistent with the view of the Supreme Court of the United States, as well as the majority of state and federal courts that have considered this issue. *See, e.g., Liberty Mutual Ins. Co. v. Wetzel* (1976), 424 U.S. 737, 742-44, 96 S.Ct. 1202, 1206, 47 L.Ed.2d 435 (a district court’s order which amounted to a grant of declaratory judgment in favor of the plaintiffs on the issue of liability, but which did not dispose of the plaintiffs’ request for injunctive relief, request for damages or request for attorney’s fees, was not appealable as a final order); *accord, Curlott v. Campbell* (9<sup>th</sup> Cir. 1979), 598 F.2d 1175, 1180 (piecemeal adjudication does not become appealable merely because cast in the form of a declaratory judgment); *Bontkowski v. Smith* (7<sup>th</sup> Cir. 2002), 305 F.3d 757, 761 (declaratory relief cannot be sought simply as a predicate for a subsequent damages claim; that would circumvent the rule that a judgment in a suit for damages is not final and appealable until the amount of damages is determined and the defendant ordered to pay it); *Henglein v. Colt Industries Operating Corp.* (3<sup>rd</sup> Cir. 2001), 260 F.3d 201, 212 (following *Liberty*); *Begley v. Sullivan* (6<sup>th</sup> Cir. 1990), 911 F.2d 731, 731 (a declaratory judgment is not final when the issue of injunctive relief is left unresolved); *Peterson v. Lindner* (7<sup>th</sup> Cir. 1985), 765 F.2d 698, 703-704 (order declaring parties’ rights does not become final and immediately appealable where issues relating to “further relief” have yet to be determined in the case); *Lucas v. Bolivar County, Miss.*

(5<sup>th</sup> Cir. 1985), 756 F.2d 1230, 1234-1235 (order granting declaratory judgment on the issue of liability which does not resolve claim for injunctive relief is not final); *Stearns v. NCR Corp.* (D.Minn. 2000), 195 F.R.D. 652, 653-654 (following *Liberty*); *Vanderpool v. Fidelity & Cas. Ins. Co.* (Ark. 1995), 908 S.W.2d 653, 654 (a declaratory judgment does not automatically become final and appealable if issues relating to further relief have yet to be determined in the case); *Principal Mut. Life Ins. Co. v. Straus*, (N.M. 1993) 863 P.2d 447, 450-451 (when a request for damages is part of a declaratory action, the judgment is not final until the damage award is quantified). Thus, extension of *Stevens* to declaratory judgment actions keeps Ohio in the mainstream of national jurisprudence.

**IF THE TRIAL COURT'S AUGUST 28, 2006 ORDER WAS A FINAL, APPEALABLE ORDER, THEN FUNDAMENTAL FAIRNESS AND SUBSTANTIAL JUSTICE REQUIRE REINSTATEMENT OF NATIONAL UNION'S APPEAL IN WALBURN I**

In *Brooks v. Rollins*, 9 Ohio St.3d 8, 12, 457 N.E.2d 1158, 1161 (1984), Justice Brown wrote in his concurring opinion that substantial justice requires decisions on their merits “rather than upon procedural niceties and technicalities.” Thus, if this Court should determine that the Trial Court’s August 28, 2006 order was a final, appealable order, and that the Trial Court properly certified its order pursuant to Civil Rule 54(B), then National Union respectfully submits that fundamental fairness and substantial justice warrant reinstatement of National Union’s appeal in *Walburn I* and remand the case to the Fourth District for further proceedings on the merits.

Appellate courts have the inherent authority to recall or modify their mandates for good cause and in the furtherance of justice. *Calderon v. Thompson* (1998), 523 U.S. 538, 549-550 118 S.Ct. 1489, 1498, 140 L.Ed.2d 728; accord, *Hawaii Housing Authority v. Midkiff* (1983), 463 U.S. 1323, 1324, 104 S.Ct. 7, 8, 77 L.Ed.2d 1426; *Patterson v. Haskins* (6<sup>th</sup> Cir. 2006), 470

F.2d 645; 661-662; *Michael v. Horn* (3<sup>rd</sup> Cir. 2005), 144 Fed.Appx. 260, 263-264; *American Iron and Steel Institute v. E.P.A.* (3<sup>rd</sup> Cir. 1977), 560 F.2d 589; 592-593; *Aerojet-General Corp. v. American Arbitration Ass'n* (9<sup>th</sup> Cir. 1973), 478 F.2d 248, 253-254; *Greater Boston Television Corp. v. F.C.C.* (D.C. Cir. 1971), 463 F.2d 268, 276-280; *Meredith v. Fair* (5<sup>th</sup> Cir. 1962), 306 F.2d 374, 378; *Central Adjustment Bureau, Inc. v. Thevenet* (N.M. 1984), 686 P.2d 954, 956-957; *Brewer v. Erwin* (Or. 1984), 690 P.2d 1122, 1123-1124; *Pacific Legal Foundation v. Cal. Coastal Comm'n* (Cal. 1982), 655 P.2d 306, 310; *Sun River Cattle Co. v. Miners' Bank of Montana* (Mont. 1974), 525 P.2d 19, 20; *Overson v. Martin* (Ariz. 1961), 367 P.2d 203, 205; *Bryan v. Bank of America* (Cal. App. 2001), 86 Cal.App.4th 185, 190-192; *John W. Brown Properties v. Blaine Cty* (Idaho App. 1997), 966 P.2d 656, 657-658. Indeed, this authority extends to reinstatement of an appeal dismissed based upon the mistaken belief an appellate court lacked jurisdiction to hear the case. *See, e.g., Williams v. Boeing Co.* (9<sup>th</sup> Cir. 1982), 681 F.2d 615, 616.

In the present case, the grounds for reinstatement are compelling as the record demonstrates that National Union did everything possible to preserve its right to appeal, except correctly predict that the Fourth District would reject the majority view represented by *Tinker v. Oldaker*, 10<sup>th</sup> Dist. Nos. 03AP-671, 03AP-1036, 2004-Ohio-3316 and *Beheshtaein v. American State Ins. Co.*, 2<sup>nd</sup> Dist. No. 20839, 2005-Ohio-5907. Indeed, the record demonstrates that National Union immediately challenged the Trial Court's certification via its Motion to Reconsider, filed its Notice with the Fourth District to preserve its right to appeal, and challenged the Fourth District's jurisdiction by attaching the Trial Court's order granting National Union's Motion to Reconsider to its Motion to Dismiss. [*Tr.R.* 93; *Walburn I R.* 1; *Walburn I R.* 4]. Thus, the Fourth District should have considered this issue, regardless of

whether the Trial Court's September 25, 2006 order granting National Union's Motion for Reconsideration was valid, because it went to the core of its jurisdiction. *Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 43 (1<sup>st</sup> Cir. 1988). The Fourth District did not do so, however, and instead raised the issue *sua sponte* in *Walburn II*, only then concluding that the August 28, 2006 interlocutory order was a final, appealable order that triggered National Union's thirty day period for appeal; a conclusion that has left National Union with a procedural decision, rather than a decision on the merits.

Fundamental fairness and substantial justice also require reinstatement of National Union's appeal because it is clear from the record that the Trial Court completely disregarded this Court's decisions in *Davidson v. Motorists Mut. Ins. Co.*, 91 Ohio St.3d 262, 2001-Ohio-36, 744 N.E.2d 713, 2001-Ohio-36 and *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 by imposing uninsured motorist coverage on a commercial general liability policy, and holding that Mrs. Walburn was an insured for purposes of such coverage even though she was neither a named insured nor employed by a named insured. This is simply not right, and should not be allowed to stand.

Accordingly, if this Court affirms the Fourth District's dismissal of *Walburn II*, National Union respectfully submits that this Court should order the Fourth District to reinstate its appeal in *Walburn I* as to resolve this case on its merits.

### CONCLUSION

Based upon the foregoing, it is clear that the issue of whether the Trial Court's August 28, 2006 interlocutory order was final is properly before this Court. Moreover, because the Walburns' claim for declaratory judgment was not a stand-alone action, but instead inextricably intertwined with other issues, *Stevens* rather than *General Accident* controls and this case should

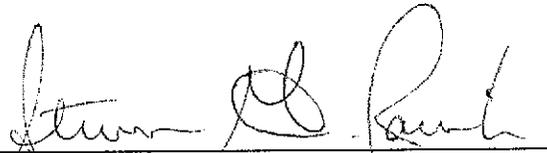
**PROOF OF SERVICE**

The foregoing was served on the following by regular U.S. Mail, postage prepaid, on  
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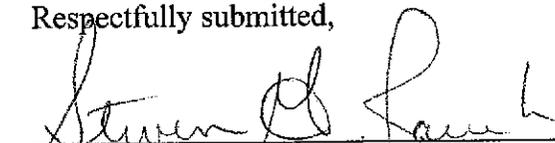
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be treated as an ordinary claim standing in contract and/or tort as to preclude certification of the Trial Court's August 28, 2006 interlocutory order. Accordingly, National Union respectfully submits that this Court should reverse the Fourth District's October 2, 2007 decision in *Walburn II*, and remand to the Trial Court for further proceedings consistent with this Court's opinion.

In the alternative, if this Court concludes that the Trial Court's August 28, 2006 interlocutory order was final and appealable, National Union respectfully submits that fundamental fairness and substantial justice require reinstatement of its appeal in *Walburn I*, and that this Court should do so and remand to the Fourth District with instructions to hear *Walburn I* on its merits.

Respectfully submitted,



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BALDWIN'S OHIO REVISED CODE ANNOTATED  
TITLE XXXIX. INSURANCE  
CHAPTER 3937. CASUALTY INSURANCE; MOTOR VEHICLE INSURANCE  
MOTOR VEHICLE INSURANCE  
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3937.18 UNINSURED AND UNDERINSURED MOTORIST COVERAGE

(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy due to bodily injury or death suffered by such insureds:

(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury, sickness, or disease, including death under provisions approved by the superintendent of insurance, for the protection of insureds thereunder who are legally entitled to recover from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.

For purposes of division (A)(1) of this section, an insured is legally entitled to recover if the insured is able to prove the elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured motor vehicle. The fact that the owner or operator of the uninsured motor vehicle has an immunity under Chapter 2744, of the Revised Code or a diplomatic immunity that could be raised as a defense in an action brought against the owner or operator by the insured does not affect the insured's right to recover under uninsured motorist coverage. However, any other type of statutory or common law immunity that may be a defense for the owner or operator of an uninsured motor vehicle shall also be a defense to an action brought by the insured to recover under uninsured motorist coverage.

(2) Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any person insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

(B) Coverages offered under division (A) of this section shall be written for the same limits of liability. No change shall be made in the limits of one of these coverages without an equivalent change in the limits of the other coverage.

(C) A named insured or applicant may reject or accept both coverages as offered under division (A) of this section, or may alternatively select both such coverages in accordance with a schedule of limits approved by the superintendent. The schedule of limits approved by the superintendent may permit a named insured or applicant to select uninsured and underinsured motorists coverages with limits on such coverages that are less than the limit of liability coverage provided by the automobile liability or motor vehicle liability policy of insurance under which the coverages are provided, but the limits shall be no less than the limits set forth in section 4509.20 of the Revised Code for bodily injury or death. A named insured's or applicant's rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be in writing and shall be signed by the named insured or applicant. A named insured's or applicant's written, signed rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's written, signed selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be effective on the day signed, shall create a presumption of

an offer of coverages consistent with division (A) of this section, and shall be binding on all other named insureds, insureds, or applicants.

Unless a named insured or applicant requests such coverages in writing, such coverages need not be provided in or made supplemental to a policy renewal or a new or replacement policy that provides continuing coverage to the named insured or applicant where a named insured or applicant has rejected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer or affiliate of that insurer. If a named insured or applicant has selected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer or affiliate of that insurer, with limits in accordance with the schedule of limits approved by the superintendent, such coverages need not be provided with limits in excess of the limits of liability previously issued for such coverages, unless a named insured or applicant requests in writing higher limits of liability for such coverages.

(D) For the purpose of this section, a motor vehicle shall be deemed uninsured in either of the following circumstances:

(1) The liability insurer denies coverage or is or becomes the subject of insolvency proceedings in any jurisdiction;

(2) The identity of the owner and operator of the motor vehicle cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of this division, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

(E) In the event of payment to any person under the coverages offered under this section and subject to the terms and conditions of such coverages, the insurer making such payment to the extent thereof is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made, including any amount recoverable from an insurer which is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer which is or becomes the subject of insolvency proceedings, to the extent of those rights against such insurer which such insured assigns to the paying insurer.

(F) The coverages offered under this section shall not be made subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

(G) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section or selected in accordance with division (C) of this section may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

(H) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section or selected in accordance with division (C) of this section and that provides a limit of coverage for payment for damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable

regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

(I) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage provided in compliance with this section.

(J) The coverages offered under division (A) of this section or selected in accordance with division (C) of this section may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under any of the following circumstances:

(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorist coverages are provided;

(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured and underinsured motorist coverages are provided.

(K) As used in this section, "uninsured motor vehicle" and "underinsured motor vehicle" do not include any of the following motor vehicles:

(1) A motor vehicle that has applicable liability coverage in the policy under which the uninsured and underinsured motorist coverages are provided;

(2) A motor vehicle owned by a political subdivision, unless the operator of the motor vehicle has an immunity under Chapter 2744. of the Revised Code that could be raised as a defense in an action brought against the operator by the insured;

(3) A motor vehicle self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered.

(L) As used in this section, "automobile liability or motor vehicle liability policy of insurance" means either of the following:

(1) Any policy of insurance that serves as proof of financial responsibility, as proof of financial responsibility is defined by division (K) of section 4509.01 of the Revised Code, for owners or operators of the motor vehicles specifically identified in the policy of insurance;

(2) Any umbrella liability policy of insurance written as excess over one or more policies described in division (L)(1) of this section.

CREDIT(S)

(2000 S 267, eff. 9-21-00; 1999 S 57, eff. 11-2-99; 1997 H 261, eff. 9-3- 97; 1994 S 20, eff. 10-20-94; 1987 H 1, eff. 1-5-88; 1986 S 249; 1982 H 489; 1980 H 22; 1976 S 545; 1975 S 25; 1970 H 620; 132 v H 1; 131 v H 61)