

ORIGINAL

IN THE SUPREME COURT OF OHIO

RAYE ANN FEAZEL, et al.,)
)
 Appellees,)
)
 v.)
)
 BONNIE F. MILLS,)
)
 and)
)
 STATE FARM MUTUAL AUTOMOBILE)
 INSURANCE COMPANY,)
)
 Appellant.)

CASE NO. 09-0949

On Appeal From The Butler
 County Court of Appeals,
 Twelfth Appellate District
 Case Nos. CA09-02-0063
 & CA09-03-0091

**MEMORANDUM IN SUPPORT OF JURISDICTION SUBMITTED BY APPELLANT
 STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**

FILED
 MAY 22 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

JAMES R. GALLAGHER (0025658)
 Gallagher, Gams, Pryor, Tallan &
 Littrell, L.L.P.
 471 East Broad Street, 19th Floor
 Columbus, Ohio 43215-3872
 (614) 228-5151 FAX: (614) 228-0032
 jgallagher@ggptl.com

PHILIP A. LOGAN (0008143)
 Katzman, Logan, Halper & Bennett
 9000 Plainfield Road
 Cincinnati, Ohio 45236
 (513) 793-4400 FAX: (513) 793-4691
 plogan@katzmanlaw.com

Attorney for Appellees

Attorney for Appellant
 State Farm Mutual Automobile
 Insurance Company

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I. STATEMENT OF WHY THIS CASE PRESENTS AN ISSUE OF CONSTITUTIONAL LAW AS WELL AS AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST.

This Honorable Court no doubt felt that when it issued a decision two months ago in *Walburn v. Dunlap* (2009), 121 Ohio St. 3d 373, it had resolved the issue of when an appeal may/must be filed in a case in which there is a request for declaratory judgment as to the amount of insurance coverage combined with a contractual claim for money damages. This Court held that an initial declaratory judgment as to the amount of UM/UIM coverage is not a “final order” pursuant to R.C. 2505.02(B)(2) where the issue of contractual damages remains unresolved. Unfortunately, despite *Walburn*, supra, the issue of when to file an appeal in such a case is far from resolved for parties litigating in the Twelfth Appellate District.

The rulings by the Twelfth District below present a double whammy which would be of significant interest to any party litigating such a case within the district and hence would constitute an issue of public or great general interest. According to the court below, what should be an interlocutory order addressing only the issue of coverage is actually a final order because the injured plaintiff is deemed to have waived any right to recover damages by not including that contested factual issue within the summary judgment motions. It becomes a dual unpleasant surprise that the defendant insurer is deprived of an appeal of right to contest the amount of applicable coverage and the injured plaintiff, who has prevailed on the coverage issue, is deprived of an opportunity to actually collect any money.

The procedural history of this case is far less complicated than that considered in *Walburn*. The Appellees are the Feazel family. Their son, Benjamin Feazel, was killed while operating a motorcycle on April 3, 2005. The driver who pulled out into the path of Benjamin Feazel’s motorcycle had \$100,000 in liability coverage which was paid to Benjamin’s estate but not yet distributed to the surviving family members.

The Feazels had nine automobile insurance policies which were issued either directly to their family, or to a family run business they had incorporated. All the policies had \$100,000/\$300,000 limits which matched the tortfeasor's liability policy. One of the nine policies covered the motorcycle Benjamin Feazel was operating at the time of his death, but the Feazels wanted to litigate whether any of the other policies might apply.

The Feazels filed a Complaint in the Butler County Court of Common Pleas against Appellant State Farm asserting multiple claims and/or causes of action. The issues framed by the Complaint included claims for declaratory judgment, breach of contract, bad faith, punitive damages, attorneys fees, and pre-judgment interest.

The trial court decided to consider the amount of available coverage first and established a briefing schedule for the parties to file Motions for Summary Judgment. The motions were filed addressing the coverage issue. The trial court rendered a decision on September 18, 2008 finding that two of the nine policies provided UM/UIM coverage subject to a setoff for amounts recovered from the tortfeasors. The decision did not address any of the remaining claims and the trial court did not even attempt to include Civ. R. 54(B) language that there was "no just cause for delay." See Trial Court Decision attached as Exhibit A.

Just a few weeks after the trial court rendered its decision, the Ohio Supreme Court overruled one of the appellate cases upon which the trial court had relied. See *Lager v. Nationwide Mut. Fire Ins. Co.*, 120 Ohio St. 3d 47 (October 1, 2008). State Farm filed a motion asking the trial court to reconsider its decision on the coverage issue. On January 22, 2009, the trial court issued an order which expressly found it had jurisdiction to hear a motion to reconsider because there were many unresolved issues still before it. See Trial Court decision attached as Exhibit B. The trial court refused to change its former decision as to the amount of UM/UIM coverage available. This time, though, the trial court included a label on the front of

the decision stating it was a “Final Appealable Order.” No Civ. R. 54(B) language was, however, referenced.

State Farm was aware of the pending *Walburn* case and, in order to be safe, advised the Feazels that it intended to appeal the January 22, 2009, decision due to the reference that it was purportedly a “Final Appealable Order.” In order that both sides would not waste a trip to the Court of Appeals, State Farm suggested that the parties stipulate the damages issues and agree that there were no other claims that were or ought to remain pending before the trial court. The parties filed stipulations with the trial court to that effect on February 23, 2009 and State Farm filed its appeal to the Twelfth District that same day. The appeal was timely given that thirty days from January 22, 2009, fell on a weekend.

State Farm timely filed its brief with the Twelfth District on April 7, 2009. To its surprise, the Twelfth District filed something of its own that very same day, a *sua sponte* dismissal of the appeal for being untimely. The Twelfth District ruled that the trial court’s original September 18, 2008, declaratory judgment on the coverage was a final and appealable order from which State Farm was required to immediately appeal. See Court of Appeals Entry of Dismissal filed on April 7, 2009 attached as Exhibit C. This was despite the existence of the breach of contract, bad faith, punitive damage, attorney fee and prejudgment issues that were pled in the Feazels’ Complaint. This was also despite the lack of any Civ. R. 54(B) designation in the September 18, 2008, order.

State Farm timely filed a Motion to Reconsider with Twelfth District pointing out that its appeal was either timely or, if anything, it might actually be premature due to the existence of these other issues in the case. State Farm specifically cited the *Walburn* decision to the court which had been decided in March, 2009, but not at that time officially published. On May 12, 2009, the Twelfth District issued a decision, sticking to its guns that State Farm was required to

have appealed the September 18, 2008, decision on the UM coverage issue and, having failed to do so, the doors to the appellate court were now closed. Remarkably, the Court of Appeals agreed that there were multiple issues that were not addressed by the trial court's decision.

In its application for reconsideration, State Farm argues that paragraphs 22 and 23 of the original complaint request damages in the amount of \$100,000 for breach of contract and that paragraph 24 of the initial complaint alleges that State Farm committed the tort of bad faith due to its refusal to pay uninsured/underinsured motorist benefits. *These claims were not raised by the parties in any motion before the trial court, or in the Additional Joint Stipulation of the Parties.*

See May 12, 2009, decision on State Farm's Motion to Reconsider, attached as Exhibit D.

The appellate court recognized that no damages were awarded in favor of the Feazels as part of the trial court's coverage decision. The only relief they had obtained was a declaratory judgment interpreting the policies.

A September 18, 2008, decision and entry resolved all issues before the court. *It interpreted the insurance policies that were at issue. No damages were awarded to appellees for breach of contract or bad faith.*

Id.

Remarkably, after determining that the Feazels complaint had asserted many other claims in their Complaint, the Twelfth Appellate District held that the Feazels had waived their rights to assert them because they had yet to raise the issues in any other form. It should be noted that there was not even a trial date set in the case so it is not entirely clear what else the Feazels were supposed to do on their end.

To the extent, if any, that these claims were not resolved, they were waived by appellees, who have never raised these issues in any form other than allegations in the initial complaint.

Id.

The net result of the rulings by the appellate court below is that State Farm has been deprived of a right to appeal and Benjamin Feazel's family has been deprived of a right to

attempt to recover damages. These are no small issues confined to a single case. The right to an appeal is a property right possessed by every citizen in Ohio and the wrongful deprivation of a right to appeal constitutes a violation of a citizen's constitutional right of due process of law.

Further, R.C. 2505.03, at the time relevant herein, provided that "[e]very final order, judgment, or decree of a court * * * may be reviewed * * * unless otherwise provided by law * * *." In addition, Ohio has adopted Appellate Rules that make every litigant entitled to "[a]n appeal as of right * * * by filing a notice of appeal * * * within the time allowed * * *." App. R. 3(A).

By developing a process of appellate review, states provide litigants with a property interest in the right to appeal. Clearly litigants cannot be deprived of this right without being granted due process of law.

Atkinson v. Grumman Ohio Corp., 37 Ohio St. 3d 80, 85 (Ohio 1988). Emphasis added.

If allowed to stand, the end result of the Twelfth District's rulings are though much broader. From this point forward, and despite this court's decision in *Walburn*, insurers who lose a summary judgment motion on a coverage issue in the Twelfth Appellate District will have to file an immediate appeal. This is regardless of whether there are other issues still pending in the case and regardless of whether there is or is not a Civ.R. 54(B) designation attached to the declaratory coverage decision. This will create havoc for trial courts attempting to move cases along to a conclusion that will lose jurisdiction while the appellate court considers on a case by case basis whether to be consistent with this case or to follow the *Walburn* decision. Insurers will not be able to risk which way the court might rule without further guidance from this superior court.

Just as worrisome, injured Plaintiffs within the Twelfth Appellate District, and really elsewhere in Ohio must now worry what else must be done in a combined declaratory judgment/contractual damage case between the filing of the Complaint and the time of trial for them not to be considered to have spontaneously waived their right to collect damages. The only safe course for such plaintiffs is to throw every issue, whether they are factually contested or not,

into every summary judgment motion in order to be sure they have not been deemed to have waived their rights to any of their claims. Trial courts will have to sift, unnecessarily, through claims having no business in a summary judgment motion as a result.

State Farm respectfully requests that this Honorable Court accept jurisdiction of this case which will require little more than a reversal of the Twelfth Appellate District's rulings below based upon *Walburn* to the effect that the September 18, 2008, decision was not a final appealable order because all the Feazels' other claims had not been unknowingly waived. This will remove a great amount of uncertainty for parties litigating in both the Twelfth Appellate District and the remainder of Ohio on this issue which will significantly impact the constitutional right of both plaintiffs and defendants to due process of law.

STATEMENT OF THE CASE AND FACTS

The Appellees are the Feazel family. Their son, Benjamin Feazel, was killed while operating a motorcycle on April 3, 2005. The driver who pulled out into the path of Benjamin Feazel's motorcycle had \$100,000 in liability coverage which was paid to Benjamin's estate but not yet distributed to the surviving family members.

The Feazels had nine automobile insurance policies which were issued either directly to their family, or to a family run business they had incorporated. All the policies had \$100,000/\$300,000 limits which matched the tortfeasor's liability policy. One of the nine policies covered the motorcycle Benjamin Feazel was operating at the time of his death, but the Feazels wanted to litigate whether any of the other policies might apply.

The Feazels filed a Complaint in the Butler County Court of Common Pleas against Appellant State Farm asserting multiple claims and/or causes of action. The issues framed by the Complaint included claims for declaratory judgment, breach of contract, bad faith, punitive damages, attorneys fees, and pre-judgment interest.

The trial court decided to consider the amount of available coverage first and established a briefing schedule for the parties to file Motions for Summary Judgment. The motions were filed addressing the coverage issue. The trial court rendered a decision on September 18, 2008 finding that two of the nine policies provided UM/UIM coverage subject to a setoff for amounts recovered from the tortfeasors. The decision did not address any of the remaining claims and the trial court did not even attempt to include Civ. R. 54(B) language that there was “no just cause for delay.”

Just a few weeks after the trial court rendered its decision, the Ohio Supreme Court overruled one of the appellate cases upon which the trial court had relied. See *Lager v. Nationwide Mut. Fire Ins. Co.*, 120 Ohio St. 3d 47 (October 1, 2008). State Farm filed a motion asking the trial court to reconsider its decision on the coverage issue. On January 22, 2009, the trial court issued an order which expressly found it had jurisdiction to hear a motion to reconsider because there were many unresolved issues still before it. The trial court refused to change its former decision as to the amount of UM/UIM coverage available. This time, though, the trial court included a label on the front of the decision stating it was a “Final Appealable Order.” No Civ. R. 54(B) language was, however, referenced.

State Farm was aware of the pending *Walburn* case and, in order to be safe, advised the Feazels that it intended to appeal the January 22, 2009, decision due to the reference that it was purportedly a “Final Appealable Order.” In order that both sides would not waste a trip to the Court of Appeals, State Farm suggested that the parties stipulate the damages issues and agree that there were no other claims that were or ought to remain pending before the trial court. The parties filed stipulations with the trial court to that effect on February 23, 2009 and State Farm filed its appeal to the Twelfth District that same day. The appeal was timely given that thirty days from January 22, 2009, fell on a weekend.

State Farm timely filed its brief with the Twelfth District on April 7, 2009. To its surprise, the Twelfth District filed something of its own that very same day, a *sua sponte* dismissal of the appeal for being untimely. The Twelfth District ruled that the trial court's original September 18, 2008, declaratory judgment on the coverage was a final and appealable order from which State Farm was required to immediately appeal. This was despite the existence of the breach of contract, bad faith, punitive damage, attorney fee and prejudgment issues that were pled in the Feazels' Complaint. This was also despite the lack of any Civ. R. 54(B) designation in the September 18, 2008, order.

State Farm timely filed a Motion to Reconsider with Twelfth District pointing out that its appeal was either timely or, if anything, it might actually be premature due to the existence of these other issues in the case. State Farm specifically cited the *Walburn* decision to the court which had been decided in March, 2009, but not at that time officially published. On May 12, 2009, the Twelfth District issued a decision, sticking to its guns that State Farm was required to have appealed the September 18, 2008, decision on the UM coverage issue and, having failed to do so, the doors to the appellate court were now closed. Remarkably, the Court of Appeals agreed that there were multiple issues that were not addressed by the trial court's decision.

In its application for reconsideration, State Farm argues that paragraphs 22 and 23 of the original complaint request damages in the amount of \$100,000 for breach of contract and that paragraph 24 of the initial complaint alleges that State Farm committed the tort of bad faith due to its refusal to pay uninsured/underinsured motorist benefits. ***These claims were not raised by the parties in any motion before the trial court, or in the Additional Joint Stipulation of the Parties.***

See May 12, 2009, decision on State Farm's Motion to Reconsider, attached as Exhibit D.

The appellate court recognized that no damages were awarded in favor of the Feazels as part of the trial court's coverage decision. The only relief they had obtained was a declaratory judgment interpreting the policies.

A September 18, 2008, decision and entry resolved all issues before the court. *It interpreted the insurance policies that were at issue. No damages were awarded to appellees for breach of contract or bad faith.*

Id.

Remarkably, after determining that the Feazels complaint had asserted many other claims in their Complaint, the Twelfth Appellate District held that the Feazels had waived their rights to assert them because they had yet to raise the issues in any other form. It should be noted that there was not even a trial date set in the case so it is not entirely clear what else the Feazels were supposed to do on their end.

To the extent, if any, that these claims were not resolved, they were waived by appellees, who have never raised these issues in any form other than allegations in the initial complaint.

Id.

State Farm now appeals from the Twelfth Appellate Court's order rendered April 7, 2009, and May 12, 2009, dismissing its appeal as being untimely because the court believes the trial court's September 18, 2007, decision on the UM/UIM coverage issue was a final appealable order from which State Farm had not appealed within thirty days.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. I:

AN ORDER THAT DECLARES THAT AN INSURED IS ENTITLED TO COVERAGE BUT DOES NOT ADDRESS DAMAGES IS NOT A FINAL ORDER AS DEFINED IN R.C. 2505.02(B)(2), BECAUSE THE ORDER DOES NOT AFFECT A SUBSTANTIAL RIGHT EVEN THOUGH MADE IN A SPECIAL PROCEEDING. WALBURN V. DUNLAP (2009) 121 OHIO ST. 3D 373, APPLIED AND FOLLOWED.

PROPOSITION OF LAW NO. II:

AN ORDER THAT DECLARES THAT AN INSURED IS ENTITLED TO COVERAGE, BUT DOES NOT ADDRESS DAMAGES OR OTHER REMAINING CLAIMS IN THE CASE AND WHICH DOES NOT EXPRESSLY INCLUDE A CIV.R. 54(B) DESIGNATION THAT THERE IS NO JUST CAUSE FOR DELAY IS ALSO NOT APPEALABLE FOR FAILURE TO SATISFY THE MANDATORY REQUIREMENTS OF CIV.R. 54(B).

The issue, bare bones, is whether a decision on a summary judgment motion which provides a declaratory judgment regarding the amount of UM coverage becomes final when there are admittedly other claims or causes of action set forth in the Complaint that have never been addressed by the trial court. The Ohio Supreme Court decided a case which is directly on point within the past two months. In *Walburn v. Dunlap* (2009) 121 Ohio St.3d. 373, this Court considered a case where the trial judge had granted summary judgment as to the amount of UM coverage but the trial court had not yet determined the amount of damages. The Supreme Court specifically considered whether such an order is a final appealable order which could be appealed.

[**P1] We are asked to determine whether an order granting partial summary judgment that declares that an insured is entitled to coverage, but does not decide whether the insured is entitled to damages, is a final, appealable order even when the trial court includes a Civ.R. 54(B) determination of no just reason for delay.

Id. at ¶ 1.

The Supreme Court had long ago held that in a case involving multiple claims an order which resolved some but not all the claims could only be considered ripe for appeal if it satisfied two separate and distinct requirements. First, the order had to meet the requirements of R.C. 2505.02 which defines what constitutes a “final order.” Second, the order was required to include the Civil Rule 54(B) language that “there is no just cause for delay.”

An order of a court is final and appealable only if it meets the requirements of **both** Civ.R. 54(B) and R.C. 2505.02. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St. 3d 86, 88.

Denham v. City of New Carlisle, 86 Ohio St.3d 594, 596 (Ohio 1999)

More recently, in *State ex rel. Scruggs v. Sadler*, 97 Ohio St. 3d 78 (Ohio 2002), the Ohio Supreme Court reaffirmed that an order by a court may only be appealed where the requirements of **both** R.C. 2505.02 and the mandatory Civil Rule 54(B) language are met.

[**P5] An order of a court is a final appealable order only if the requirements of both R.C. 2505.02 and, if applicable, Civ.R. 54(B), are met. *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, syllabus.

Id. at ¶ 5.

The September 18, 2008 decision by the trial court below did not comply with either R.C. 2505.02 nor Civil Rule 54(B) and was not an order requiring an appeal. In the *Walburn* decision rendered by the Supreme Court in March of this year, the Court ruled under almost identical facts that an order holding that an insurer owed UM coverage, but which did not address the issue of damages is not a “final order” for purposes of R.C. 2505.02(B)(2).

We hold that an order that declares that an insured is entitled to coverage but does not address damages is not a final order as defined in R.C. 2505.02(B)(2), because the order does not affect a substantial right even though made in a special proceeding. See Gen. Acc. Ins. v. Ins. Co. of N. Am. (1989), 44 Ohio St.3d 17. Therefore, our answer to the certified question is no. In a case involving multiple claims, a judgment in a declaratory judgment action is not a final, appealable order when the trial court finds that an insured is entitled to coverage but has not addressed the issue of damages, even though the order includes a Civ.R. 54(B) certification.

Id at ¶ 4. Emphasis added.

The Supreme Court explained that the insurer was only obligated to pay the Walburn’s UM benefits if they were awarded damages in addition to the declaration of coverage. Without the determination of damages, there is no substantial right affected by the order as required by R.C. 2505.02.

[P26]** A declaration that an insured is entitled to UM coverage presents a different scenario. Here, the court ordered that National Union must provide UM coverage. However, the Walburns must still establish their damages in order to receive the UM benefits. National Union is obligated to pay the Walburns only if they are awarded damages. Thus, a declaration that an insured is entitled to coverage but does not address damages does not affect a substantial right as that term is defined in R.C. 2505.02(A)(1).

Id. at ¶ 26.

Pursuant to this Court’s decision in *Walburn*, the trial court’s September 18, 2008, decision as to the amount of UM coverage did not satisfy the first requirement for a final appealable order, i.e., that the order be final as defined in 2505.02(B)(2). Nor did the order satisfy the second requirement that had to be met in order for the order to be final and appealable. The September 18, 2008, decision did not state anywhere that pursuant to Rule

54(B) the trial court had determined there was “no just cause for delay.” Even if the decision had satisfied the requirements of R.C. 2505.02(B)(2), the Supreme Court has held that the failure to include the Rule 54(B) language renders the decision not appealable.

[*77] The trial court's entry of judgment against Mucci was not a final order. When an order "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties [it] shall not terminate the action * * * and the order * * * 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." Civ. R. 54(B). An entry of judgment involving fewer than all of the claims or parties is not final unless the court expressly determines that there is "no just reason for delay." *Id.*

Because the judgment entry against Mucci did not adjudicate the liabilities of all the parties **and it did not contain the Civ. R. 54(B) words of "no just reason for delay,"** it was subject to modification.

Jarrett v. Dayton Osteopathic Hospital, Inc., 20 Ohio St.3d 77, 77-78 (Ohio 1985).

In *Jarrett*, the trial court had completely resolved some claims in the case but, as in this case, there had not been a determination as to the amount of damages. Since the trial court did not include the mandatory language “no just reason for delay” the Supreme Court held the matter could not possibly be final and appealable. *Jarrett*, *supra*; see further, *State ex rel. A & D P'ship v. Keefe*, 77 Ohio St.3d 50, 57 (Ohio 1996); *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 79 (Ohio 2002).

The Twelfth Appellate District which found below that the decision on the coverage issue alone was final and appealable actually came to the exact opposite conclusion in an earlier appeal. In *Harris v. Conrad*, 2002 Ohio 3885, P13 (Ohio Ct. App., Warren County June 17, 2002), the court determined that a judgment entry had addressed all the claims raised by the plaintiffs below except the plaintiffs' request for attorney fees. The Fourth Appellate District noted that the judgment appealed from did not contain the required Civil Rule 54(B) language. The court dismissed the appeal as being premature because there was an unresolved claim below for attorneys fees and the mandatory Rule 54(B) language had not been used.

[*P12] The judgment entry in this case did not refer to Civ.R. 54(B) and did not use the language required by the rule. As the entry fails to address one of the multiple claims presented by appellees, namely, the claim for attorney fees, this

issue remains unresolved and thus is not appealable. See *Chef Italiano Core v. Kent State Univ.* (1989), 44 Ohio St.3d 86. Although the appealed entry arguably may appear to comport with the finality requirements of R.C. 2505.02, it is not a final appealable judgment pursuant to Civ.R. 54(B) because it fails to adjudicate one of the parties' claims and fails to include the mandatory Civ.R. 54(B) language. *Accord Noble*, 44 Ohio St.3d 92, 540 N.E.2d 1381 at syllabus; *Shelby Ins. Group v. Gumm* (Dec. 27, 1995), 1995 Ohio App. LEXIS 5839, Ross App. No. 95CA2102. See, e.g., *Stevens v. Manchester* (Mar. 13, 1997), 1997 Ohio App. LEXIS 899, Franklin App. No. 96APE08-1022; *Mattoni v. Mattoni* (1997), 118 Ohio App.3d 782, 694 N.E.2d 104.

Id. at ¶ 12.

In this case, there was similarly a claim for attorney fees as well as six or seven other claims that were never addressed by the trial court.

PROPOSITION OF LAW NO. III.

AN ORDER BY AN APPELLATE COURT REFUSING TO ACCEPT AN APPEAL BECAUSE AN EARLIER DECLARATORY DECISION WAS RENDERED IN THE CASE WHICH: DID NOT ADDRESS ALL THE ISSUES IN THE CASE; DID NOT CONTAIN A CIVIL RULE 54(B) DESIGNATION THAT THERE WAS NO JUST CAUSE FOR DELAY; AND, WAS NOT SERVED WITH A NOTICE FROM THE CLERK OF COURTS THAT A FINAL APPEALABLE ORDER HAD BEEN FILED VIOLATES A LITIGANT'S CONSTITUTIONAL RIGHT OF DUE PROCESS AND SUCH LITIGANT'S RIGHT TO AN APPEAL.

The troubling aspect of this case and the precedent it creates, is that it seems to be doing an “end around” on the *Walburn* decision. By finding that the plaintiffs herein had asserted other claims in their Complaint, but that they had spontaneously waived any right to assert them the court below transformed an interlocutory trial court order into a final appealable order with no notice to either party. State Farm is prejudiced because it had no notice that an appeal needed to be filed. The Feazels were prejudiced because they unknowingly lost their right to actually collect any money damages despite prevailing on the coverage issue. Such a scenario flies in the face of all litigants whom this Court has ruled are absolutely entitled to “reasonable notice of a final appealable order.” *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St. 3d 80, 86 (Ohio 1988)

The right to an appeal is a property right possessed by every citizen in Ohio and the wrongful deprivation of a right to appeal constitutes a violation of a citizen's constitutional right of due process of law.

Further, R.C. 2505.03, at the time relevant herein, provided that "[e]very final order, judgment, or decree of a court * * * may be reviewed * * * unless otherwise provided by law * * *." In addition, Ohio has adopted Appellate Rules that make every litigant entitled to "[a]n appeal as of right * * * by filing a notice of appeal * * * within the time allowed * * *." App. R. 3(A).

By developing a process of appellate review, states provide litigants with a property interest in the right to appeal. Clearly litigants cannot be deprived of this right without being granted due process of law.

Atkinson v. Grumman Ohio Corp., 37 Ohio St. 3d 80, 85 (Ohio 1988). Emphasis added. In *Atkinson*, this Court held that the failure by the courts to give reasonable notice that a final order requiring appeal has been rendered is a violation of a party's right of due process. In this case, the Court of Appeals closed its doors based upon a failure to appeal an interlocutory order which failed to satisfy R.C. 2505.02(B)(2), did not contain a Civil Rule 54(B) designation and which was not served with any notice by the clerk that a final appealable order had been filed. This scenario violates State Farm's constitutional right of due process and right of appeal.

CONCLUSION:

State Farm respectfully requests that this Honorable Court grant jurisdiction over this matter to prevent what is sure to be procedural havoc throughout the Twelfth Appellate District elsewhere in Ohio. The rulings below stand for the proposition that a decision on a coverage issue is a final appealable order requiring an immediate appeal even if: it fails to constitute a final order under R.C. 2505.02(B)(2) as interpreted in *Walburn*; it fails to include a Civ.R. 54(B) designation of "no just cause for delay;" and no *Atkinson v. Grumman Ohio Corp* type notice is given to the parties by the clerk to notify them a final appealable order has been filed. This is because the Plaintiffs are deemed to waive their rights to assert a damage claim and any other claim by not performing some unspecified act in addition to properly pleading the case in the Complaint. Citations to this Court's *Walburn* decision will be of doubtful assistance in cases within the Twelfth Appellate District since opposing parties may rightly assert that *Walburn* was already decided when the Twelfth District Appellate Court ruled a declaratory judgment decision

has to be immediately appealed. This is even more so since the Twelfth Appellate District was specifically cited to the *Walburn* decision in the Motions to Reconsider filed in this case.

Practicing in courts within the Twelfth Appellate District, and to a lesser extent everywhere else in Ohio, will be a procedurally dangerous place to be until and unless this Honorable Court accepts this appeal and reverses the court below. Until the rulings in this case are reversed, any party losing on any declaratory judgment issue in the Twelfth Appellate District will have to immediately appeal such interlocutory decisions despite *Walburn*, the lack of Rule 54(B) language and despite the lack of any finding of damages if the dismissal of this appeal is allowed to stand as being somehow untimely. This is exactly the result that the Ohio Supreme Court was trying to avoid in the *Walburn* decision.

Respectfully submitted,

GALLAGHER, GAMS, PRYOR
TALLAN & LITTRELL L.L.P.

BY: 
JAMES R. GALLAGHER (0025658)
Attorney for Appellant
State Farm Mutual Automobile
Insurance Company
471 East Broad Street, 19th Floor
Columbus, Ohio 43215-3872
(614) 228-5151 FAX: (614) 228-0032
jgallagher@ggptl.com

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was served by regular U.S. mail, postage pre-paid, upon Philip A. Logan, Attorney for Appellees, at Katzman, Logan, Halper & Bennett, 9000 Plainfield Road, Cincinnati, Ohio 45236 on this 22nd day of May, 2009.


JAMES R. GALLAGHER (0025658)
Attorney for Appellant
State Farm Mutual Automobile
Insurance Company

SEP 18 2008

CINDY CARPENTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

RAYE ANN FEAZEL, et al., : CASE NO: CV 2007 03 1222
Plaintiffs, : JUDGE PATRICIA S. ONEY
vs. : DECISION AND ENTRY
BONNIE F. MILLS, et al., :
Defendants. :

This matter is before this Court on a Motion for Summary Judgment filed on December 21, 2007, by Plaintiffs, Raye Ann Feazel, Administratrix of the Estate of Benjamin Feazel, Raye Ann Feazel, individually and on behalf of the parents and next of kin of Benjamin Feazel, and Terry Feazel, individually and on behalf of the parents and next of kin of Benjamin Feazel (collectively referred to hereinafter as "Plaintiffs"). On January 16, 2008, Defendant, State Farm Mutual Automobile Insurance Company (referred to hereinafter as "State Farm") filed a response to Plaintiff's Motion for Summary Judgment and a Cross Motion for Summary Judgment.¹ Plaintiffs filed a reply on January 25, 2008.

Plaintiffs' Motion argues that summary judgment is warranted against State Farm as there are no genuine issues of material fact as to Plaintiffs' entitlement to underinsured motorist benefits related to a fatal accident which occurred while their son, Benjamin Feazel, was operating Terry Feazel's motorcycle. At the time of the collision, Terry Feazel's motorcycle was covered under an insurance policy, No. 146-8790-DO-735, issued by State

Judge
PATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

¹ On February 27, 2008, Plaintiffs filed a notice of partial Dismissal as to Count Two of the Complaint. On April 22, 2008, a stipulated dismissal of all claims against Defendant, Bonnie Mills was filed. The only remaining claim is Count Three of the Complaint against State Farm.

Farm.² There were also other State Farm policies in effect that were held by the Plaintiffs, including policies held by the family business, T.R. Technological Services, Inc. (Copies of the policies with a stipulation were filed December 21, 2007.) The Plaintiffs were the owner/operators of the family business. The Plaintiffs and Benjamin Feazel were also employees of T.R. Technological Services, Inc. Plaintiffs claim that their personal policies, as well as the business policies, provide UM/UIM coverage as to the accident and death of Benjamin Feazel. Therefore, Plaintiffs argue, they and the estate are entitled to a payout up to the per person limit on each policy.

State Farm argues that summary judgment is warranted against Plaintiffs as (1) Benjamin Feazel is not an insured under the business policies; (2) the policies have anti-stacking provisions; (3) the policies contain an "other owned vehicle" exclusion; and (4) all claims are a "single claim" for the purposes of UM/UIM.

Plaintiffs filed a Reply in which it is argued that they are named principals to the insurance policies issued to the business and under one, Terry Feazel is the named insured. Furthermore, Plaintiffs argue that they are not precluded from recovery under the personal policies by the "other owned vehicle" exclusion as Plaintiffs' son did not suffer a bodily injury, as the excluding language states, but a death. The Plaintiffs' claim is for wrongful death and they state that although their son is excluded from recovery, they are not.

Judge

ATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

² Nine State Farm policies were in effect at the time of the collision and are the subject of these Motions for Summary Judgment. Policies A1 - A3 have Raye Ann and Terry Feazel listed as named insureds and Policies A4-A9 list T.R. Technological Services, Inc. as the named insured. It should be noted that Policy A8 lists T.R. Technological Services, Inc. as the named insured and Terry Feazel as the owner of the vehicle covered by that policy. Policy A(1) provided coverage for the motorcycle which was involved in the subject collision.

Under Civ.R. 56, summary judgment is proper when: (1) No genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to a judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and (4) viewing such evidence most strongly in the favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St.3d 344. In order to prevail on a motion for summary judgment pursuant to Civ.R. 56, the moving party has a heavy burden of showing the absence of issues of material fact. *Adickes v. S.H. Kress & Co.* (1970), 398 U.S. 144, 153; *Celotex Corp v. Catrett* (1986), 477 U.S. 317, 322. See also, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112. The moving party must show that reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317. The evidence to properly support a Motion for Summary Judgment shall be in the form of "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact...No evidence or stipulation may be considered except as stated in this rule." Civ. R. 56(C).

Policies Issued to T.R. Technological Services, Inc.

In the matter before this Court, State Farm has presented a considerable amount of case law regarding the business policies held by T.R. Technological Services, Inc. State Farm argues that the language of the business policies limit UM/UIM coverage to insured human beings. Those persons under the business policy are insured if they are occupying a vehicle owned by the business. There is no genuine issue of material fact as to the vehicle Benjamin

Feazel, an employee of the business, was operating. The motorcycle was owned individually by Terry Feazel, and not T.R. Technological Services, Inc. Therefore, no coverage is available to the Estate or the parents of Benjamin Feazel under Policies A(4), A(5), A(6), A(7), and A(9), marked as such in the Stipulation filed December 21, 2007.

Policies Issued to T.R. Technological Services, Inc.

on a vehicle owned by Terry Feazel

Policy A(8), issued to T.R. Technological Services, Inc. and naming the business as the insured, includes a notation on the declarations page that the vehicle is owned by Terry Feazel. When addressing the issue of whether this policy provides that UM/UIM coverage to Terry Feazel for Benjamin Feazel's death, this Court looks to the language of the policy on Page 3 which reads:

Insured – means the **person or persons** covered by uninsured motor vehicle coverage.

This is:

1. the first **person** named in the declarations;
2. his spouse;
3. their relatives...

According to State Farm's declarations page, although the corporate entity is listed as the named insured, Terry Feazel is the first person named in the declarations page and the owner of the vehicle. Whether the vehicle is used for business purposes only or whether it was the intention of State Farm to be liable for coverage of the nature at issue here is not addressed by the parties.

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Judge

TRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

In *Merz v. Motorists Mutual Insurance Company* (12th Dist.) 2007-Ohio-2293, the

Twelfth District stated that:

An insurance policy is a contract between the insurer and the insured and a court must construe the policy's language as a matter of law. *Wilson v. Smith*, Summit App. No. 22193, 2005-Ohio-337, ¶ 9, citing *Leber v. Smith*, 70 Ohio St.3d 548, 553, 639 N.E.2d 1159, 1994-Ohio361. A court must examine the insurance contract as a whole and presume that the parties' intent is reflected in the policy's language. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 219, 797 N.E.2d 1256, 2003-Ohio-5849. A court must "look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy." *Id.* When the language of a written contract is clear, a court may not look further than the writing itself to determine the parties' intent. *Id.*

As ambiguity in a contract shall be construed against the drafter, this language should be viewed as extending coverage to the owner of the vehicle. Therefore, it appears that Terry Feazel is an insured under this policy and that the language would provide coverage to him for Benjamin Feazel's accident. As there is no genuine issue of material fact regarding this policy, Terry Feazel is covered by this policy's UM/UIM limits.

State Farm argues that if the business policy provides UM/UIM coverage, the anti-stacking provisions preclude recovery as there may be coverage under one of the personal policies, such as that which provides coverage on the motorcycle involved in the collision. The State Farm policies provide that:

2. If Other Policies Issued By Us To You, Your Spouse or Any Relative Apply

If two or more motor vehicle liability policies issued by us to **you, your spouse**, or any **relative** providing uninsured motor vehicle coverage apply to the same accident, the maximum limit of our liability under all the policies shall not exceed the highest applicable limit of liability under any one policy.

Judge

TRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

See, Policies A(1) – A(9), marked as such in the Stipulation filed December 21, 2007.

The language of this provision indicates that stacking is not allowed on multiple policies issued to “you, your spouse, or any relative.” The anti-stacking provisions were intended to prevent insureds from recovering under multiple policies issued to them. According to Policy A(8), State Farm issued that policy to the family business on a vehicle owned by Terry Feazel. The policy language of “you, your spouse or relative” clearly applies only to persons to whom the policy was issued and not corporate entities. Therefore, when attempting to recover under both a business policy and a personal policy, the anti-stacking provision would not apply. As such, there is no genuine issue of material fact that recovery under the business policy would allow Terry Feazel to recover under another policy issued to him personally.

Policies Issued to Raye Ann Feazel and Terry Feazel

Policies A(1), A(2), and A(3), marked as such in the Stipulation filed December 21, 2007, were policies issued to the Plaintiffs and which list Terry Feazel and Raye Ann Feazel as the named insureds.³ The issues with regards to these personal policies are (1) whether the “other vehicle” exception limits recovery to only the policy covering the motorcycle that Benjamin Feazel was riding at the time of his death; (2) whether the anti-stacking provisions preclude the Plaintiffs from recovery under multiple policies; and (3) whether there should be an offset taken if and/or when the Plaintiffs recover from the tortfeasor.

³ Policy A(1) insured the motorcycle which was the involved in the subject collision.

Judge

ATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

A. "Other Vehicle" Exception

State Farm argues that the "other vehicle" exclusion listed in their policies, including Policies A(2) and A(3), preclude recovery for a bodily injury under a certain policy if the vehicle involved in the subject collision was not an insured vehicle under that policy.⁴ Plaintiffs distinguish their situation from that intended by the language of the State Farm policy. Plaintiffs state that they are seeking recovery for the wrongful death of their son and those damages are not related to the "bodily injury" described in the policies. Thus, Plaintiffs argue, although the "other vehicle" exclusion would preclude Benjamin Feazel from recovery under any policy, it would not preclude his parents from recovery.

In support of their argument, Plaintiffs cite to *Aldrich v. Pacific Indemnity Company* (7th Dist.) 2004-Ohio-1546 as distinguishing their wrongful death claim from an ordinary claim for bodily injury under an automobile policy. The Court in *Aldrich* found that:

[u]nder the plain language of the statute, an "other owned auto" exclusion cannot prohibit a wrongful death beneficiary from collecting for their mental anguish. Thus, the wrongful death claims in this case are not excludable under R.C. 3937.18(J) and are thus not barred by the "other owned auto" exclusion in this policy.

Aldrich v. Pacific Indemnity Company (7th Dist.) 2004-Ohio-1546 at *P1. State Farm discussed in their Response the case law regarding "other vehicle" exception, but did not address the distinction of *Aldrich*. This Court finds that there is no genuine issue of material fact that, given the nature of the damages claimed by the Plaintiffs, that the "other vehicle" exclusion does not apply to bar Plaintiffs from recovering under the Policies A(2) and A(3).

⁴ The "other vehicle" exception issue does not apply to Policy A(1) as the motorcycle involved in the collision was covered by this policy.

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B. Stacking

§3937.18 provides, in part, that:

(F) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages 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.

Oh. Rev. Code § 3937.18. As stated above, the State Farm policies contain an anti-stacking provision which acts to treat all claims related to this one incident as a "single claim." As such provisions are allowable in insurance policies, there is no genuine issue of material fact that the Plaintiffs will be precluded from recovering under the three personal policies more than the one maximum recovery allowed per person, which is \$100,000.

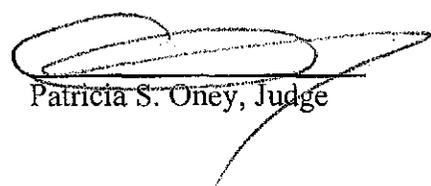
C. Offset

Although the Plaintiffs have yet to receive any amount from the tortfeasor for this collision, it is indicated that the claims against the tortfeasor are settled and the tortfeasor has tendered her limits. As both parties note, and in conjunction with the applicable law, the amount received for UM/UIM coverage under their individual policies shall be offset by the amount they eventually receive from the tortfeasor.

Conclusion

In conclusion, and based upon the memoranda, documents submitted, and applicable case law, this Court finds in favor of State Farm on the issue that (1) the anti-stacking provision applies to precludes multiple recoveries by the Plaintiffs on the personal policies, A(1), A(2), and A(3); and (2) the business policies, A(4), A(5), A(6), A(7), and A(9) do not provide coverage to Benjamin Feazel for the collision at issue. This Court further finds in favor of the Plaintiffs that (1) recovery is allowable for Terry Feazel under the business policy, A(8), in the amount of \$100,000; and (2) one recovery for the Plaintiffs under the personal policies A(1) – A(3) is allowable in the amount of \$100,000.

ENTER



Patricia S. Oney, Judge

cc:

Philip A. Logan
9000 Plainfield Rd.
Cincinnati, Ohio 45236

James Gallagher
471 E. Broad Street, 19th Floor
Columbus, Ohio 43215-3872

Judge

ATRICIA S. ONEY
Common Pleas Court
Butler County, Ohio

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

RAYE ANN FEAZEL, et al., : CASE NO. CV 2007 03 1222
Plaintiff, : JUDGE PATRICIA S. ONEY
v. :
BONNIE F. MILLS, et al., :
Defendants, :
: FINAL APPEALABLE ORDER

FILED BUTLER CO.
COURT OF COMMON PLEAS
JAN 22 2009
CINDY CARPENTER
CLERK OF COURTS

This matter is before this Court on Defendant, State Farm Mutual Automobile Insurance Company's (referred to hereinafter as "State Farm"), Motion to Reconsider this Court's Decision and Entry dated September 18, 2008. State Farm's Motion to Reconsider seeks review of this Court's Decision and Entry and a finding that Plaintiffs, Raye Ann Feazel Administratrix of the Estate of Benjamin Feazel, Raye Ann Feazel, individually and on behalf of the parents and next of kin of Benjamin Feazel, and Terry Feazel, individually and on behalf of the parents and next of kin of Benjamin Feazel (collectively referred to hereinafter as "Plaintiffs") are entitled to only one recovery on their business and personal insurance policies of the maximum UM coverage of \$50,000/\$100,000. State Farm further indicates that the Plaintiffs have settled with the tortfeasor and that they have received \$100,000 from State Farm as the tortfeasor's liability insurer.

In order to obtain relief from a non-final order, a party may properly file a motion for reconsideration with the trial court. *Helman v. EPL Prolong, Inc.* (2000), 139 Ohio App.3d 231, 240, 743 N.E.2d 484, 491, citing to *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 380, 423 N.E.2d 1105, 1106, at fn.1. "Requests for reconsideration of interlocutory

Judge
PATRICIA ONEY
Common Pleas Court
Butler County, Ohio

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orders in the trial court 'may be entertained at the discretion of the court.' " *Id.*, at 241, 743 N.E.2d at 491, quoting *LaBarbera v. Batsch* (1962), 117 Ohio App. 273, 276, 182 N.E.2d 632, 634. "The test generally applied upon the filing of a motion for reconsideration is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Sannes v. Jeff Wyler Chevrolet, Inc.* (1999), 107 Ohio Misc.2d 11, 14, 736 N.E.2d 116, 118, quoting *Woerner v. Mentor Exempted Village School Dist. Bd. Of Ed.* (1993), 84 Ohio App.3d 844, 846, 619 N.E.2d 34, 36.

State Farm argues that the effect of *Lager v. Miller-Gonzalez*, 2008-Ohio-4838, a Supreme Court case from October 1, 2008, overrules *Aldrich v. Pacific Indemnity Company*, Columbiana App. No. 02 CO 54, 2004-Ohio-1546. The *Aldrich* case was, among other cases, relied upon by this Court in the rendering of its Decision and Entry. State Farm points to the Supreme Court's ruling in *Lager* that the "other owned vehicle" exclusion barred recovery by an insured for any bodily injury received while occupying a vehicle not insured under the policy being applied. The recent decision in *Lager* focuses on whether the "other owned vehicle" exclusion bars recovery "for bodily injury" when the policy allows for UM/UIM coverage "because of bodily injury." This potential ambiguity of the "other owned vehicle" exclusion in the policy language was the basis of the analysis undertaken by the Supreme Court in *Lager*.

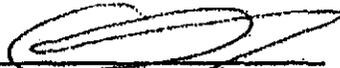
Plaintiffs filed a Memorandum in Response which counters that the *Lager* decision does not affect the validity of the *Aldrich* case as the cases are unrelated and distinct. The *Aldrich* case addressed the issue of whether parents can recover for the wrongful death of

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their child under an insurance policy which includes an "other owned vehicle" exclusion in light of the language of Oh. Rev. Code §3937.18(J). The *Aldrich* Court held that the "other owned vehicle" exclusion "did not prohibit parents and siblings of [the] child from collecting UIM benefits for wrongful death of child" as the "policy cannot preclude more than that which the statute allows." *Aldrich v. Pacific Indemnity Company*, Columbiana App. No. 02 CO 54, 2004-Ohio-1546, at *Holding* and ¶42. At the time of the Decision and Entry by this Court, the *Aldrich* case was good law. Therefore, there was no error in this Court's Decision and Entry. Furthermore, this Court is not persuaded by State Farm that the *Lager* case overrules *Aldrich* and thus, there was no issue that this Court did not fully consider at the time it issued its Decision and Entry.

State Farm's Motion to Reconsider is, therefore, denied.

ENTER


Patricia S. Oney, Judge

cc:

Philip A. Logan
9000 Plainfield Rd.
Cincinnati, Ohio 45236

James Gallagher
471 E. Broad Street, 19th floor
Columbus, Ohio 43215-3872

Judge
PATRICIA ONEY
Common Pleas Court
Butler County, Ohio

CINDY CARPENTER



CLERK OF COURTS

1000441771

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY c/o JAMES R
GALLAGHER
471 E BROAD ST 19TH FLOOR
COLUMBUS, OH 43215-3872

Date: January 23, 2009

Case No.: CV 2007 03 1222

RAYE ANN FEAZEL et al vs. BONNIE F MILLS et al

**NOTICE OF FILING OF FINAL APPEALABLE ORDER
COURT OF COMMON PLEAS, BUTLER COUNTY, OHIO**

You are hereby notified that a judgment entry identified by the Court as a "Final Appealable Order" was
filed with the Butler County Clerk of Courts on this date: 01-22-09

CINDY CARPENTER
Butler County Clerk of Courts

By: CHRISTINA HOWARD
Deputy Clerk

GOVERNMENT SERVICES CENTER • 315 HIGH STREET • SUITE 550 • HAMILTON, OHIO 45011-6016

BUTLER COUNTY CLERK OF COURTS
www.butlercountyclerk.org

B-4

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

RAYE ANN FEAZEL, et al., : CASE NO. CA2009-02-063, -03-091
Appellees, : ENTRY OF DISMISSAL
vs. :
BONNIE F. MILLS, et al., :
Appellants. :

FILED BUTLER CO.
COURT OF APPEALS
APR 07 2009
CINDY CARPENTER
CLERK OF COURTS

The above cause is before the court pursuant to a notice of appeal filed by appellant, State Farm Mutual Automobile Insurance Company, on February 23, 2009 (Case No. Butler CA2009-02-063), and a second notice of appeal filed by State Farm on March 20, 2009 (Case No. CA2009-03-091). The February 23, 2009 notice of appeal states that State Farm intends to appeal a January 22, 2009 decision and entry by the Butler County Court of Common Pleas denying a motion to reconsider, and a September 18, 2008 decision and entry resolving motions for summary judgment filed by State Farm and appellees, Raye Ann Feazel, Administratrix of the Estate of Benjamin Feazel; Raye Ann Feazel, Individually and on behalf of the parents and next of kin of Benjamin Feazel; Terry Feazel, Individually and on behalf of the parents and next of kin of Benjamin Feazel; and a cross-motion for summary judgment filed by State Farm. The March 20, 2009 notice of appeal states that State Farm intends to appeal the above decisions "and the Additional Joint Stipulation of the Parties filed on February 23, 2009."

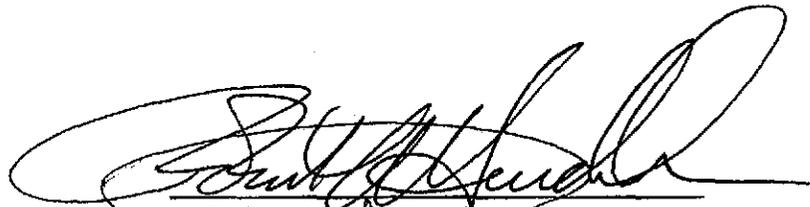
The September 18, 2008 decision and entry resolving the motions and cross-motion for summary judgment appears to resolve all remaining issues with respect to the underlying case. It is therefore a final appealable order, and should have been appealed within 30 days or on or before October 18, 2008. In the January 22, 2009 decision and entry, the court denied a motion for reconsideration. A motion for reconsideration of a final

order filed in a trial court is a nullity. *Pitts v. Ohio Dept. of Transportation* (1981), 67 Ohio St.2d 378. Since a motion for reconsideration is a nullity and not a final appealable order, this court lacks jurisdiction to entertain an appeal from an order denying a motion for reconsideration. *State v. Leach*, Clermont App. No. CA2004-02-011, 2005-Ohio-2370.

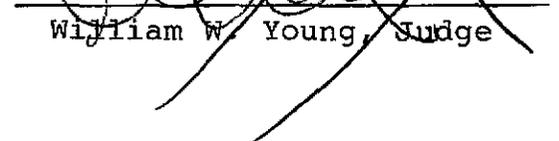
The "Additional Joint Stipulation of the Parties" filed on February 23, 2009, as the caption indicates, is not an entry or judgment by the trial court; it sets forth certain stipulations agreed to by the parties in light of the trial court's decision and the filing of this appeal. State Farm's appeal from this "Additional Joint Stipulation of the Parties" finds no support in the Rules of Appellate Procedure or the final order statute, R.C. 2505.02.

Based upon the foregoing, the present appeal is not timely with respect to the decision and entry filed on September 18, 2008; the January 22, 2009 decision and entry denying State Farm's motion to reconsider is not appealable because the motion is a nullity; and the additional stipulation of the parties is not an appealable order. Accordingly, Case Nos. Butler CA2009-02-063 and Butler CA2009-03-091 are hereby DISMISSED, with prejudice, costs to appellant.

IT IS SO ORDERED.


Robert A. Hendrickson, Judge


Robert P. Ringland, Judge


William W. Young, Judge

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

RAYE ANN FEAZEL, et al., : CASE NO. CA2009-02-063, -03-091
Appellees, : ENTRY DENYING APPLICATION FOR
RECONSIDERATION

vs.

BONNIE F. MILLS, et al.,

Appellants.

FILED BUTLER CO.
COURT OF APPEALS

MAY 12 2009

CINDY CARPENTER
CLERK OF COURTS

The above cause is before the court pursuant to an application for reconsideration filed by appellant, State Farm Mutual Automobile Insurance Company, on April 17, 2009; a memorandum in opposition filed by counsel for appellees, Raye Ann Feazel, et al., on April 23, 2009; and a reply memorandum filed by appellant on April 28, 2009.

On April 7, 2009, this appeal was dismissed for the reason that it was not filed timely with respect to the trial court's decision and entry filed on September 18, 2008. This court found a motion for reconsideration filed by appellant on November 13, 2008 to be a nullity, and found that an "Additional Joint Stipulation of the Parties" filed on February 23, 2009 did not resolve any issues that were necessary to make the September 18, 2008 decision and entry a final order.

In its application for reconsideration, State Farm argues that paragraphs 22 and 23 of the original complaint request damages in the amount of \$100,000 for breach of contract, and that paragraph 24 of the initial complaint alleges that State Farm committed the tort of bad faith due to its refusal to pay uninsured/underinsured motorist benefits. These claims were not raised by the parties in any motion before the trial court, or in the Additional Joint Stipulation of the Parties. State Farm now apparently asserts that none of the orders appealed from were final due to claims raised in the

initial complaint but never otherwise argued or addressed by the parties or the trial court.

The September 18, 2008 decision and entry resolved all issues before the court. It interpreted the insurance policies that were at issue. No damages were awarded to appellees for breach of contract or bad faith. To the extent, if any, that these claims were not resolved, they were waived by appellees, who have never raised these issues in any form other than allegations in the initial complaint.

Based upon the foregoing, the application for reconsideration is DENIED.

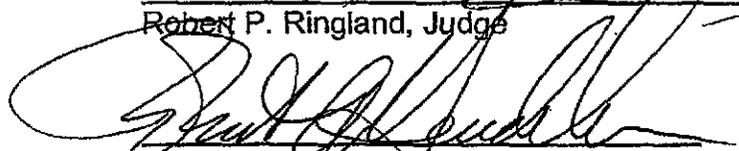
IT IS SO ORDERED.



William W. Young, Judge



Robert P. Ringland, Judge



Robert A. Hendrickson, Judge