[Cite as *Walburn v. Dunlap,* 2007-Ohio-5398.]

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

Styrk Walburn, et al.,	:	
Plaintiffs-Appellees,	:	Case No. 06CA655
v.	:	
Wendy Sue Dunlap, et al.,	:	
Defendants,	:	
and	:	DECISION AND JUDGMENT ENTRY OF DISMISSAL
National Union Fire Insurance Company of Pittsburgh, PA.,	:	
	:	**Released 10/2/07**
Defendant-Appellant.	:	

APPEARANCES:

Steven G. Janik, and Christopher Van Blargan, JANIK & DORMAN, L.L.P., Cleveland, Ohio, for Appellant.

C. Russell Canestraro, AGEE, CLYMER, MITCHELL & LARET, Columbus, Ohio, for Appellees.

Harsha, J.

{¶1} This matter is before us on the issue of our jurisdiction to review the trial court's December 12, 2006, judgment. Appellant complains that the parties have not raised the issue and that we have waited until after the completion of briefing to question our authority to decide this case. However, it was not apparent a jurisdictional problem existed until we began our review of the merits. More importantly, we have a duty to raise the issue sua sponte because it is improper for us to proceed in the absence of jurisdiction.

{¶2} In January 2003, appellees, Styrk and Betty Walburn, filed a complaint naming Wendy Sue Dunlap, Ohio Mutual Insurance Group, The Cincinnati Insurance Company, and appellant, National Union Fire Insurance Company of Pittsburgh, PA, as defendants. The Walburns alleged that Styrk had been injured in an automobile accident caused by Dunlap while Styrk was in the course and scope of his employment with The Sherwin-Williams Company. They also claimed that Dunlap was either uninsured or underinsured at the time of the accident, and that they therefore were entitled to UM/UIM coverage through their insurance company, Ohio Mutual, Betty's employer's insurance company, Cincinnati Insurance, and National Union, which insured Sherwin-Williams.

{¶3} On February 4, 2005, the trial court granted summary judgment to National Union. Although the trial court's entry dismissed National Union as a party to the action, the court did not include a finding that there was no just reason for delay. Thus, it was not a final appealable order because the case involved multiple parties and claims. See Civ.R. 54(B) and *General Acc. Ins. v. Ins. Co. of North America* (1989), 44 Ohio St.3d 17, 20.

{¶4} On February 18, 2005, appellees filed a motion asking the trial court to reconsider its decision. On August 25, 2006, the trial court vacated its February 4, 2005 judgment. Because the February 4, 2005, order was not final, the trial court had jurisdiction to reconsider it. See Id. and *Pitts v. Ohio Dept. of Transportation* (1981), 67 Ohio St.2d 379, fn.1, 423 N.E.2d 1105.

{¶5} On August 28, 2006, the trial court granted the Walburns' summary judgment and denied National Union's similar request, finding that the Walburns were

entitled to coverage up to $2,000,000. This time, the trial court included the Civ.R. 54(B) language concerning no just reason for delay.

{¶6} On September 14, 2006, National Union filed a motion for reconsideration of the August 28, 2006, judgment in favor of the Walburns. On September 25, 2006, National Union filed a notice of appeal from that judgment with this court (Vinton App. No. 06CA653). Later that same day, however, the trial court vacated its August 28, 2006, judgment because it incorrectly concluded that judgment was not a final appealable order as it did not terminate the entire action. On September 28, 2006, National Union filed a motion to voluntarily dismiss its appeal. We granted the motion on October 4, 2006. See, Vinton App. No. 06CA653.

{¶7} On December 12, 2006, the trial court issued another judgment granting the Walburns' motion for summary judgment and denying National Union's motion. National Union filed its notice of appeal in this case (Vinton App. No. 06CA655) on December 27, 2006.

{¶8} After reviewing the record and the memoranda of the parties, we conclude we do not have jurisdiction to review the appeal filed by National Union on December 27, 2006. App.R. 4(A) requires an appellant to file the notice of appeal within thirty days of the filing of a final judgment from which it appeals. The trial court's August 28, 2006, judgment, which it unsuccessfully attempted to vacate, is the final appealable order finding coverage in favor of the Walburns, not the December 27, 2006, entry.

{¶9} We acknowledge that determining what is a final appealable order can be difficult in litigation involving multiple parties and claims. In order to make that determination, we engage in a two step process. First, we look at R.C. 2505.02 to see if

the order is "final." Second, if it is final, we must then look to see if Civ.R. 54(B) language is required. *General Acc. Ins.,* supra, at 21.

{¶10} R.C. 2505.02 states:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> * * *
>
> (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment.

Declaratory judgment actions are special proceedings and a determination on the issue of insurance coverage affects a substantial right of both the insured and the insurer. *General Acc. Ins.* at 21-22. Thus, the August 23, 2006, judgment was a final order. Because the litigation involved multiple claims and parties, and the August 28, 2006, judgment did not adjudicate them all, Civ.R. 54(B) applied. After the trial court found that there was no just reason for delay, this order was both final and appealable. See Civ.R. 54(B) and *General Acc. Ins.* at 20. See also, *Stewart v. State Farm Mutual Automobile Ins. Co.*, Lucas App. No. L-05-1285, 2005-Ohio-5740, ¶17 et seq.

{¶11} National Union did initially appeal the August 28, 2006, judgment. However, it subsequently voluntarily dismissed that appeal in misguided reliance on the trial court's reconsideration entry of September 25, 2006, which attempted to vacate its prior order. However, the motion for reconsideration and the trial courts corresponding judgment were nullities because there is no mechanism for a trial court to reconsider a final order. See *Pitts* at 378.

{¶12} The December 12, 2006, judgment is not the final appealable order from

which National Union may appeal. The August 28, 2006, entry effectively terminated the action with respect to National Union because it arose in a special proceeding and the finding of coverage affected a substantial right. It became appealable by virtue of its no just reason for delay language. See Civ.R. 54(B) and *General Acc. Ins.,* supra. See also, *Stewart*, supra at ¶18 explaining the different treatment awarded special proceedings and ordinary actions such as breach of contract or tort. On October 4, 2006, when we granted National Union's motion to voluntarily dismiss the appeal in Vinton App. No. 06CA653, the right to appeal the trial court's August 28, 2006, declaration of the Walburns' right to coverage was effectively terminated.

{¶13} Accordingly, we dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

Kline, J., Dissenting:

{¶14} I respectfully dissent. The majority finds that we do not have jurisdiction to review this December 12, 2006, judgment because the August 28, 2006, judgment, which contained Civ.R. 54(B) language, was the final, appealable judgment and National Union failed to appeal that judgment within thirty days. Because, in my view, the August 28 judgment was not a final, appealable order, I disagree.

{¶15} On December 27, 2006, National Union filed an appeal from the trial court's December 12, 2006, entry. National Union's sixth assignment of error raises the final, appealable order issue. It states that "THE TRIAL COURT ERRED IN CERTIFYING ITS DECISION WITH RESPECT TO PLAINTIFFS[‘] MOTION FOR PARTIAL SUMMARY JUDGMENT AS FINAL APPEALABLE ORDERS."

{¶16} The majority relies on the Supreme Court of Ohio's decision in *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, in support of its decision that the August 28, 2006, judgment entry was a final, appealable order. In that case, the court held that "[a] declaratory judgment action is a special proceeding pursuant to R.C. 2505.02 and, therefore, an order entered therein which affects a substantial right is a final appealable order." Id. at paragraph two of syllabus. The majority concludes that the determination of coverage affects a substantial right.

{¶17} In my view, the *General Acc.* case is distinguishable from this case. Here, the Walburns' complaint does not specifically seek relief pursuant to the declaratory judgment statute. Instead, the Walburns' complaint seeks UM/UIM coverage, i.e., damages, in a common-law action on a contract. Although the determination of coverage is necessary in determining whether the Walburns are

entitled to recovery from National Union, the Walburns' complaint goes beyond that by seeking the insurance proceeds.

{¶18} Further, in *General Acc.*, the court held that "the *duty to defend* involves a substantial right to both the insured and the insurer." (Emphasis added.) *Id*. at 22. The court did not find that the determination of whether coverage exists, absent any determination of actual damages, affects a substantial right to both the insured and the insurer. To the contrary, the Tenth Appellate District holds that it does not. See *Tinker v. Oldaker*, Franklin App. No. 03-AP-671, 03AP-1036, 2004-Ohio-3316, ¶14 (finding that even if the court were to assume that the summary judgment decision was rendered in a special proceeding, the failure to determine damages when requested in a coverage action "does not 'affect' a substantial right[,]" and thus, is not a final appealable order); see, also, *Nungester v. Transcontinental Ins. Co.*, Ross App. Nos. 03CA2744, 03CA2749, 2004-Ohio-3857, ¶15 (Harsha, J., concurring) (stating where a complaint seeks a declaratory judgment on the issue of coverage as well as damages, an order granting summary judgment on the declaratory judgment aspect of the complaint without awarding damages is not a "final appealable order despite the Civ.R. 54(B) language"). In fact, this court has continuously held that "[a] determination of liability without a determination of damages is not a final appealable order because damages are part of a claim for relief, rather than a separate claim in and of themselves." *Shelton v. Eagles Foe Aerie 2232* (Feb. 15, 2000), Adams App. No. 99CA678, citing *Horner v. Toledo Hospital* (1993), 94 Ohio App.3d 282.

{¶19} Therefore, where damages are sought under a UM/UIM policy, a trial court's grant of summary judgment in favor of the insured and against the insurer on the

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

{¶20} Consequently, I would find that the August 28 judgment is not a final, appealable order despite the Civ.R. 54(B) language. With this finding, I would then proceed with the analysis and determine if the December 12 judgment is a final, appealable order.

{¶21} Accordingly, I dissent.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED and that Appellees recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Vinton County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J.: Concurs in Judgment and Opinion.
Kline, J.: Dissents with Attached Dissenting Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.