

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

AMERICAN NATIONAL PROPERTY AND
CASUALTY COMPANY

Plaintiff-Appellant

-vs-

STEPHEN D. PENNINGTON, et al.,

Defendants-Appellees

JUDGES:
William B. Hoffman, P.J.
John W. Wise, J.
Julie A. Edwards, J.

Case No. CT2008-0021

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal From Muskingum County Court
Of Common Pleas Case No. CC2007-0258

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

August 6, 2009

APPEARANCES:

For Plaintiff-Appellant

For Defendants-Appellees

EDWARD M. RYDER
DAVID K. FRANK
JEFFERY S. MAYNARD
Mazanex, Raskin, Ryder &
Keller Co., L.P.A.
250 Civic Center Drive, Suite 400
Columbus, Ohio 43215

EDWIN J. HOLLERN, ESQ.
Hollern & Associates
77 N. State Street
Westerville, Ohio 43081

GARY COWAN, ESQ.
EI & Elk Co., L.P.A.
Landerhaven Corporate Center
6110 Parkland Boulevard
Mayfield Heights, Ohio 44124

SUSAN E. SMALL, ESQ.
Hillis & Small, LLC
825 Adair Avenue
Zanesville, Ohio 43701

Edwards, J.

{¶1} Plaintiff-appellant, American National Property and Casualty Company, appeals from the April 12, 2008, Decision and Judgment Entry and the August 11, 2008, Journal Entry of the Muskingum County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellee William Pennington is the minor child of appellees Stephen Pennington and Margaret Maxwell. Appellees have never been married to each other and do not live together.

{¶3} On or about June 11, 2003, appellee William Pennington, who was three years old at the time, was injured when appellee Stephen Pennington turned on a tractor while Williams' hand was in the fan belt. The accident occurred on appellee Stephen Pennington's property. As a result, appellee William Pennington has had numerous operations on his hand.

{¶4} On April 18, 2007, appellee William Pennington, by and through his mother, appellee Margaret Maxwell, and appellee Margaret Maxwell filed a complaint (Case No. CC2007-0258) against appellee Stephen Pennington, alleging that appellee Stephen Pennington was negligent.

{¶5} Thereafter, on July 16, 2007, appellant American National Property and Casualty Company filed a complaint for declaratory judgment (Case No. CH2007-0489) against appellees. Appellant, in its complaint, alleged that, at the time of the accident, it had in full force and effect an Ohio Special Homeowners' Policy that was issued to appellee Stephen Pennington. Appellant also alleged that at the time of the accident, appellee William Pennington was residing with his father, appellee, Stephen

Pennington. In its complaint, appellant alleged that appellee Stephen Pennington had requested indemnification and a defense with respect to the underlying action and that it had denied his claim for indemnification, but was providing a defense for the underlying lawsuit until the declaratory judgment action was determined. Appellant, in its complaint, alleged that there was no coverage under the homeowner's policy that it had issued to appellee Stephen Pennington. Appellant specifically sought an order from the trial court declaring that:

{¶6} “(a) William C. Pennington was a resident of the subject property insured by the Policy;

{¶7} “(b) William C. Pennington was an insured as defined by the Policy issued to Stephen D. Pennington;

{¶8} “(c) The Policy excludes liability coverage for bodily injury to an insured;

{¶9} “(d) The Policy excludes medical payments to residents of the insured Premises;

{¶10} (e) Stephen D. Pennington is not entitled to indemnification in the underlying lawsuit as he is an ‘insured’ under the Policy.

{¶11} (f) Stephen D. Pennington is not entitled to defense related to the claims asserted in the underlying lawsuit.

{¶12} (g) William C. Pennington is excluded from medical payment coverage pursuant to the terms and conditions of the Policy;...”

{¶13} On December 28, 2007, appellant filed a Motion for Summary Judgment in the declaratory judgment action (Case No. CH2007- 0489).

{¶14} Pursuant to a Judgment Entry filed on January 3, 2008, the two cases were consolidated by the trial court.

{¶15} Thereafter, on January 23, 2008, appellee William Pennington, by and through his mother, appellee Margaret Maxwell, and appellee Margaret Maxwell filed a brief in opposition to appellant's Motion for Summary Judgment and a Cross Motion for Summary Judgment on the issue of insurance coverage under the subject homeowner's policy. On February 1, 2008, appellee Stephen Pennington filed a memorandum in opposition to appellant's Motion for Summary Judgment and a Cross Motion for Summary Judgment, arguing that there was coverage under the subject homeowner's policy for the accident.

{¶16} As memorialized in a Decision and Judgment Entry filed on April 1, 2008, the trial court denied appellant's Motion for Summary Judgment while granting the Cross Motions for Summary Judgment. The trial court specifically found that William Pennington was a "resident of only his mother, Margaret Maxwell's home." The trial court thus found coverage under the policy issued by appellant to appellee Stephen Pennington.

{¶17} On April 30, 2008, appellant filed a "Motion for Civil Rule 54(B) Certification." On the same date, appellant filed a Notice of Appeal from the trial court's April 1, 2008 Decision and Judgment Entry. Subsequently, on August 11, 2008, the trial court issued a Journal Entry adding Civ.R. 54(B) certification language.

{¶18} On August 27, 2008, appellant filed a Motion in this Court for an order granting it leave to amend its Notice of Appeal to include the trial court's August 11, 2008 Journal Entry. Pursuant to a Judgment Entry filed by this Court on September 9,

2008, this Court found that the Notice of Appeal that was filed on April 30, 2008, was premature and, therefore, it was not necessary for the Notice of Appeal to be amended instantaneously. This Court further states as follows: “[p]ursuant to the agreed order submitted to this Court, Appellant’s Notice of Appeal is deemed amended to include the August 11, 2008, entry.”

{¶19} Appellant now raises the following assignments of error on appeal

{¶20} “I. THE TRIAL COURT ERRED, TO THE PREJUDICE OF APPELLANT AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY (‘ANPAC’), IN RENDERING SUMMARY JUDGMENT IN FAVOR OF WILLIAM PENNINGTON AND STEPHEN PENNINGTON.”

{¶21} “II. THE TRIAL COURT ERRED, TO THE PREJUDICE OF APPELLANT ANPAC, IN FAILING TO RENDER SUMMARY JUDGMENT IN FAVOR OF ANPAC.”

{¶22} However, we cannot address the merits of appellant’s assignments of error because there is not a final, appealable order in this case. Appellate courts have jurisdiction to review the final orders or judgments of lower courts within their appellate districts. Section 3(B)(2), Article IV, Ohio Constitution; see, also, *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, 861 N.E.2d 519, at paragraphs 13-14. Absent a final order, an appellate court has no jurisdiction to review a matter, *General Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266, and such a matter must be dismissed. *Renner’s Welding and Fabrication, Inc. v. Chrysler Motor Corp.* (1996), 117 Ohio App.3d 61, 64, 689 N.E.2d 1015.

{¶23} An order which adjudicates one or more but fewer than all the claims or the rights and liabilities of fewer than all the parties is only a final, appealable order if it meets the requirements of R.C.2505.02 and Civ.R.54 (B).

{¶24} Recently, the Ohio Supreme Court, *in Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221, 904 N.E.2d 863 held, in relevant part, as follows: “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, 540 N.E.2d 266.... 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 paragraph 4.

{¶25} Because the trial court, in the case sub judice, determined that there was coverage under the homeowner’s policy issued by appellant to appellee Stephen Pennington, but did not determine damages, we find that there was no final, appealable order despite the Civ.R. 54(B) certification language. See *Walburn*, *supra*.

{¶26} We note that the parties, on April 16, 2009, filed a stipulation in this Court regarding our jurisdiction to hear the appeal. The parties, in the stipulation, stated, in relevant part, as follows:

{¶27} “WHEREAS, to resolve and avoid any potential jurisdictional issue presented by *Walburn v. Dunlap*, *supra*, regarding the jurisdiction of the said Court of Appeals to address the issue of insurance coverage presented in the consolidated

cases, in view of the fact that the damage issue was not resolved in CC 2007-0258, the Parties have, by a separate confidential Agreement Regarding Damages, all reached an understanding, determination, and settlement regarding the damages issue, without the need for trial, which agreement, however, is subject to a determination by this Court of Appeals on the insurance coverage questions presented in this appeal, and...”

{¶28} However, the fact remains that the order appealed from is not a final, appealable order and no final, appealable order has been filed in the trial court.

{¶29} Accordingly, appellant’s appeal is dismissed for lack of jurisdiction.

By: Edwards, J.

Hoffman, P.J. and

Wise, J. concur

JUDGES

JAE/d0422

