

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GERALD KALLAUS, ET AL.
Plaintiffs/Cross-Appellants

-vs-

DANNY R. ALLEN, ET AL.
Defendants-Appellants

-vs-

WESTFIELD INSURANCE
COMPANIES
Third-Party/Defendant-Appellee

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Julie A. Edwards, J.

Case No. 09-CA-0002

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Court of
Common Pleas, Case No. 06-CV-01635

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

November 30, 2009

APPEARANCES:

For Defendants-Appellants
Danny R. Allen, Danny Allen Well
Drilling, Inc., and Danny R. Allen and
Teresa A. Allen, Trustees

For Plaintiffs/Cross-Appellants
Gerald and Anne Kallaus
Kabat Mielziner & Sobel

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For Third-Party/Defendant-Appellee
Westfield Insurance Company

SHAWN W. MAESTLE
RONALD A. RISPO
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1301 E. 9th Street, Suite 1900
Cleveland, Ohio 44114

Hoffman, J.

{¶1} Defendants-appellants Danny R. Allen, Dan Allen Well Drilling, Inc., and Danny R. Allen and Teressa A. Allen, Trustees of the Teressa Allen Trust (“the Allen defendants”) together with Plaintiffs/Cross-appellants Gerald and Anne Kallaus (“Kallaus”) appeal the December 9, 2008 Judgment Entry entered by the Licking County Court of Common Pleas, granting summary judgment in favor of third-party defendant-appellee Westfield Insurance Companies (“Westfield”) and declaring Westfield was not obligated to indemnify or defend the Allen defendants.

STATEMENT OF THE FACTS

{¶2} On July 8, 2006, plaintiff Gerald Kallaus was operating his motorcycle on Columbia Road in Licking County, Ohio. As he approached a driveway to property owned by defendants Danny R. Allen and Teressa A. Allen, Trustees of the Teressa Allen Trust, defendant Danny R. Allen was backing up a truck owned by defendant Dan Allen Well Drilling, Inc. out of the driveway. Kallaus’ motorcycle collided with Allen’s truck as the truck entered the road from the driveway, resulting in serious personal injuries to Kallaus.

STATEMENT OF THE CASE

{¶3} On November 6, 2006, Kallaus filed their Complaint against the Allen defendants, seeking damages which resulted from the collision. The Allen defendants filed a third-party complaint against Westfield for indemnity and defense pursuant to a commercial general liability insurance policy issued to Dan Allen Well Drilling, Inc.

{¶14} Westfield filed an answer and counterclaim seeking declaratory judgment it was not obligated to indemnify or defend the Allen defendants. Cross-motions for summary judgment were filed on the counterclaim for declaratory judgment. Via Judgment Entry filed December 9, 2008, the trial court granted Westfield's motion for summary judgment. The Allen defendants filed their Notice of Appeal from that judgment as did Kallaus, which notice has been treated as a cross-appeal. On February 2, 2009, the trial court amended its December 9, 2008 Judgment Entry, asserting there was no just reason for delay.

{¶15} The Allen defendants and Kallaus prosecute this appeal, assigning as error:

{¶16} "I. THE TRIAL COURT ERRED IN GRANTING WESTFIELD'S MOTION FOR SUMMARY JUDGMENT AND IN DENYING THE CROSS-MOTIONS FOR SUMMARY JUDGMENT FILED BY PLAINTIFFS AND THE ALLEN DEFENDANTS."

{¶17} As a preliminary matter, we must first determine whether the order under review is a final appealable order. If an order is not final and appealable, then we have no jurisdiction to review the matter and must dismiss it. See *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266. In the event that the parties to the appeal do not raise this jurisdictional issue, we must raise it sua sponte. See *Chef Italiano Corp. v. Kent State Univ.* (1989), 44 Ohio St.3d 86, 541 N.E.2d 64, syllabus; *Whitaker–Merrell v. Carl M. Geupel Const. Co.* (1972), 29 Ohio St.2d 184, 186, 58 O.O.2d 399, 280 N.E.2d 922.

{¶18} We decline to address the merits of Appellants' arguments at this time as we find the order being appealed is not a final appealable order, despite the trial court's

certification under Civ.R. 54(B). We do so under the authority of the Ohio Supreme Court's decision in *Walburn v. Dunlap*, 2009-Ohio-1221.

{¶9} The *Walburn* court held, although an action seeking a declaration of the parties' rights and responsibilities as they pertained to UM coverage was a special proceeding under R.C. 2505.02, an order declaring an insured is entitled to coverage but not addressing damages does not affect a "substantial right"; therefore, is not a final appealable order despite the trial court's certification there was no just cause for delay. The *Walburn* court distinguished its decision in *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d. *Gen. Acc.* involved an action seeking declaration the defendant insurance companies had a duty to defend and indemnify in a companion tort case. The Ohio Supreme Court in *Gen. Acc.* found the trial court's decision was a final appealable order although there were other pending claims.

{¶10} The *Walburn* court found the duty to defend involves a substantial right to both the insured and the insurer. Because *Walburn* involved a declaration of coverage, but did not involve a duty to defend, the Supreme Court held a declaration an insured is entitled to coverage that does not address damages does not affect a substantial right as that term is defined in R.C. 2505.02(A)(1).

{¶11} At first blush, the case sub judice seems to fall directly within the realm of *Gen. Acc.* because Westfield sought a declaration regarding indemnity and its duty to defend. However what is unusual in this case is the fact Westfield also issued an automobile policy to Danny Allen, and Westfield has tendered a full defense to the Kallaus claims against him. Therefore, we find the duty to defend is not really at issue. Because damages have yet to be determined in this case, we find the case more

closely fits the analysis in *Walburn*.¹ Where the duty to defend is not involved, we find whether the declaration is one finding coverage or not finding coverage does not change the analysis where the damages are still unresolved.

{¶12} Having concluded no final appealable order exists in this case, we dismiss this appeal for lack of jurisdiction.

By: Hoffman, J.

Gwin, P.J. and

Edwards, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

¹ We recognize the Dan Allen Well Drilling, Inc. is the insured under the CGL in question, but find it sufficiently aligned in interest with Danny R. Allen, individually, that defense of one results in defense of the other.

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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Plaintiffs/Cross-Appellants	:	
-vs-	:	JUDGMENT ENTRY
	:	
DANNY R. ALLEN, ET AL.	:	
Defendants-Appellants	:	
-vs-	:	
	:	
WESTFIELD INSURANCE	:	
COMPANIES	:	
Third-Party/Defendant-Appellee	:	Case No. 09-CA-0002

For the reason stated in our accompanying Opinion, this appeal is dismissed.

Costs to Appellants.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS