[Cite as *Welsh v. Indiana Ins. Co.*, 2006-Ohio-6803.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KEITH WELSH, et al.	:	JUDGES:
	:	Hon: W. Scott Gwin, P.J.
Plaintiffs	:	Hon: Julie A. Edwards, J.
	:	Hon: John F. Boggins, J.
and	:	
	:	Case No. 2005-CA-00327
VENETA LALLI	:	
	:	
Appellant	:	O P I N I O N
	:	
-vs-	:	
	:	
INDIANA INSURANCE COMPANY, et al.	:	
	:	
Defendants	:	
	:	
and	:	
	:	
ALLSTATE INSURANCE COMPANY	:	
	:	
Appellee	:	

CHARACTER OF PROCEEDING:	Civil Appeal From Stark County Court Of Common Pleas, Case No. 2001-DV-01693
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	December 18, 2006
APPEARANCES:	
For Plaintiff-Appellant	For Defendant-Appellee
JOHN S. COURY 116 Cleveland Ave., NW Ste. 717 Canton, Ohio 44702	FRANK MAZGAJ, ESQ. GREGG A. PEUGEOT, ESQ. HANNA, CAMPBELL & POWELL LLP P.O. Box 5521 3737 Embassy Parkway Akron, Ohio 44334

Gwin, PJ.

{¶1} Plaintiff-Appellant Veneta Lalli appeals from the Stark County Court of Common Pleas' November 22, 2005, Judgment Entry which granted appellee Allstate Insurance Company's Motion to Set Dates and from the December 21, 2005, Judgment Entry which overruled appellant's Motion for Reconsideration of the Order Setting Dates. Appellant assigns a single error:

{¶2} "I. THE TRIAL COURT ERRED IN ORDERING THAT APPELLANT'S CASE PROCEED TO JURY TRIAL WHEN THE EARLIER FINAL JUDGMENT OF THE TRIAL COURT, FROM WHICH NO APPEAL WAS TAKEN BY ALLSTATE INSURANCE COMPANY, ORDERED APPELLANT'S CASE TO BINDING ARBITRATION. IN EFFECT, THE TRIAL COURT ERRED WHEN IT UNILATERALLY VACATED ITS PRIOR FINAL JUDGMENT CONCERNING APPELLANT'S ENTITLEMENT TO BINDING ARBITRATION."

{¶3} This case is one of a number of lawsuits arising out of an automobile accident. On January 7, 1997, Fannie Welsh was driving home from work, when Thomas Sherwood negligently operated his vehicle, striking the Welsh automobile. Following the accident, Fannie Welsh prematurely gave birth to Eleni Welsh. Eleni died a few hours after delivery.

{¶4} Mr. Sherwood, the tortfeasor, had automobile liability coverage with limits of $100,000.00 per person and $300,000.00 per accident. Keith Welsh, as the administrator of the Estate of Eleni Welsh, settled with the tortfeasor and his insurer for $100,000.00. The Stark County Probate Court divided this settlement among Eleni's parents Keith and Fannie Welsh, and Cathleen and David Welsh, the paternal

grandparents of Eleni Welsh with whom Keith and Fannie resided. Appellant, the maternal grandmother of Eleni Welsh, did not receive any portion of this settlement.

{¶5} On June 22, 2001, the plaintiffs, including the Estate, Keith and Fannie Welsh, Cathleen and David Welsh, and Appellant, filed a complaint for declaratory judgment in the Stark County Court of Common Pleas seeking coverage under nine different policies of insurance, pursuant to R.C. 3937.18 and the Ohio Supreme Court's decision in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.,* 85 Ohio St.3d 660, 1999-Ohio-292, 710 N.E.2d 1116. In addition to the various *Scott-Pontzer* claims, appellant sought uninsured/underinsured motorist benefits under her personal auto policy issued by appellee Allstate pursuant to *Moore v. State Auto Insurance Company*, 88 Ohio St.3d 27, 2000-Ohio-264, 723 N.E.2d 97 and *Sexton v. State Farm Mut. Auto Ins. Co.* (1982), 69 Ohio St.2d 431, 433 N.E.2d 555.

{¶6} In their complaint, the plaintiffs asked the trial court to declare uninsured/underinsured motorist coverage existed under the various policies in question, and asked the trial court to order the parties to binding arbitration to determine the issue of total damages.

{¶7} All parties filed motions for summary judgment. On October 18, 2002, the trial court granted the plaintiffs' motion for summary judgment and denied the motions for summary judgment of the various insurers. The trial court also ordered all parties to binding arbitration to determine the issue of total damages, stating: "[a]s to the issue of binding arbitration, this Court finds that although not all the policies have a binding arbitration clause, this entire matter shall be ordered to binding arbitration to determine

the issues of liability and damages." Allstate did not appeal the decision. However, numerous other parties appealed the October 18, 2002, judgment entry.

{¶8} The *Scott-Pontzer* carriers filed separate notices of appeal, each raising distinct variations of the *Scott-Pontzer* issues. This court addressed these appeals in four separate opinions, see *Welsh v. Indiana Insurance Co*., Stark Cty. App. No. 2002CA00370, 2003-Ohio-5026; *Welsh v. Indiana Insurance Co*., Stark Cty. App. No 2002CA00376, 2003-Ohio-5827; *Welsh v. Indiana Insurance Co*., Stark Cty. App. No 2002CA00378, 2003-Ohio-5054; and, *Welsh v. Indiana Insurance Co.*, Stark Cty. App. No 2002CA00379, 2003-Ohio-5244.

{¶9} The Ohio Supreme Court's decision in *Westfield Ins. Co. V. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 ultimately disposed of all the *Scott-Pontzer* claims.

{¶10} In August of 2005 the Ohio Supreme Court declined jurisdiction in the last of the *Scott-Pontzer* appeals. Thereafter, appellant asked Allstate to proceed to binding arbitration as required by the trial court's October 18, 2002, judgment entry. On October 24, 2005, Allstate filed a motion which asked the trial court to set a new case management schedule, because all of the *Scott-Pontzer* carriers had been dismissed and the only remaining defendant was Allstate. Appellant responded by asking the court to order Allstate to designate an arbitrator and proceed with arbitration.

{¶11} On November 22, 2005, the trial court granted Allstate's motion and set dates to take the case to trial. Appellant filed a motion for reconsideration, which the trial court denied without discussion on December 21, 2005.

{¶12} R.C. 2711.02 states in pertinent part:

{¶13} "(B) If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

{¶14} "(C) Except as provided in division (D) of this section, an order under division (B) of this section that grants or denies a stay of a trial of any action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505 of the Revised Code."

{¶15} We find the October 18, 2002, judgment entry was a final appealable order. The fact the entry did not contain the language "no just reason for delay" does not alter our analysis. See, *Griffith v. Linton* (Franklin Cty. 1998), 130 Ohio App.3d 746, 750, 721 N.E.2d 146, citing *Stewart v. Shearson Lehman Bros., Inc.,* (1992), 71 Ohio App.3d 305, 593 N.E.2d 403, syllabus, (decision pursuant to R.C. 2711.02 is a final appealable order even without the language required in Civ.R. 54(B)).

{¶16} In contrast, Allstate argues the court treated its motion to set a case management schedule as a motion for reconsideration of the October 18, 2002,

judgment entry ordering arbitration. However, the Ohio Rules of Civil Procedure do not provide for a motion to reconsider a final judgment in original actions, and motions for reconsideration are considered a nullity, as are all judgments or orders entered on them. See *Pitts v. Dept. of Transportation* (1981), 67 Ohio St.2d 378, 379, 423 N.E.2d 1105. We find because the October 18, 2002, judgment entry was a final appealable order, the court could not treat Allstate's motion as a motion for reconsideration.

{¶17} In *Grava v. Parkman Township*, 73 Ohio St.3d 379, 1995-Ohio-331, the Ohio Supreme Court explained the principle of res judicata involves both issue preclusion and claim preclusion, historically called estopppel by judgment. A valid final judgment rendered on the merits of a case bars all subsequent actions based upon any claim arising out of the transaction or occurrence which was the subject matter of the previous action. Id. We find because Allstate did not appeal the October 2002 final judgment ordering the matter to arbitration, the principles of res judicata apply.

{¶18} Further, the trial court found the arbitration provision in the Allstate policy requires both parties consent in order for arbitration to be mandatory, and the court found both parties have not consented. We do not agree. Allstates' failure to appeal the order in 2002 constitutes consent to the arbitration, and Allstate cannot withdraw its consent three years later, based upon a change in the law affecting other defendants, i.e. *Galatis*, but not directly affecting the pending claim, brought pursuant to *Sexton* and *Moore*.

{¶19} We find the court erred in reactivating the case to the docket for resolution of appellant's claim against Allstate. The assignment of error is sustained.

{¶20} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio is reversed, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion.

By: Gwin, P.J.,

Boggins, J.. concurs;

Edwards, J. dissents

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HON: W. SCOTT GWIN

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HON: JULIE A. EDWARDS

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HON: JOHN F. BOGGINS

WSG:clw 1205

EDWARDS, J., DISSENTING OPINION

{¶21} I respectfully dissent from the majority's decision. While I agree that, if the trial court treated the motion for case management schedule as a motion for reconsideration, the trial court should have denied the motion since no mechanism for a motion for reconsideration of a final order exists, I cannot agree that it is clear that the trial court treated the motion for case management schedule as a motion to reconsider.

{¶22} In its motion for case management schedule, appellee argued: "On October 18, 2002, this Court issued a Judgment Entry ruling on the various Summary Judgment Motions filed by the parties. The *Scott-Pontzer* carriers appealed the Court's findings and the appellate process has just recently concluded. As a result, all of the *Scott-Pontzer* carriers have been dismissed from the case and the only remaining Defendant is Allstate Insurance Company. Accordingly, Allstate Insurance Company respectfully requests that this Honorable Court set a new case management schedule for Plaintiffs and Defendant." Id. at 1.

{¶23} Appellant responded to the appellee's motion for case management schedule, arguing that the October 18, 2002, judgment entry ordering all of the parties to binding arbitration was a final order and requesting that the trial court compel appellee to appoint an arbitrator. Appellee filed a reply motion in which it argued: "Despite explicit language in the Allstate policy that both parties must consent to binding arbitration before arbitration became mandatory, this Court ordered binding arbitration to determine the issues of liability and damages presumably because of the large number of original Defendants and unique issues of law presented. Now the case has been streamlined as only one Defendant remains and the issues in this case are much

limited. Accordingly, it is respectfully requested that this court set a case management schedule so that both parties can have adequate time for discovery." Id. at 1-2.

{¶24} On November 22, 2005, the trial court issued the judgment entry in which it granted appellee's motion to set dates, stating: "On October 18, 2002, this Court ruled on various motions for summary judgment with regard to insurance coverage from numerous defendants. As to the insurance coverage of Allstate, this court stated: 'As to the Allstate policy that was a personal auto policy of Veneta Lalli, this Court finds that Veneta Lalli has UM/UIM coverage to the limit of One Hundred Thousand Dollars.'…Since the arbitration provision in the Allstate policy requires both parties to consent to arbitration prior to it becoming mandatory (and both parties have not done so), this Court is reactivating the case to the docket for resolution of the claim against Allstate." Id.

{¶25} Appellant filed a motion for the court to reconsider its November 22, 2005, entry. She argued that the October 18, 2002, judgment entry which ordered all parties to binding arbitration was never appealed by Allstate, and that Allstate's failure to appeal renders the binding arbitration order final, thus rendering the October 18, 2002, judgment entry res judicata. Appellant argued that the trial court converted appellee's motion for case management schedule into a motion for 60(B) relief. Appellant argued further that a 60(B) motion cannot be used as a substitute for timely appeal, and that Allstate should have appealed the arbitration order.

{¶26} Trial courts have discretion to treat motions for reconsideration as Civ. R. 60(B) motions. *Brys v. Trumbull Cement Products,* Trumbull App. No. 2005-T-0057, 2006-Ohio-4941, at ¶14. However, the trial court did not explicitly set forth whether it

had in fact converted appellee's motion for case management schedule into a Civ. R. 60(B) motion. Indeed, while it is true that a Civ. R. 60(B) motion cannot be used as a substitute for appeal, Civ. R. 60(B) may still have application in the case sub judice. The trial court's October 18, 2002, judgment entry addressed motions for summary judgment filed by both the appellant and numerous insurance carriers. Some of the carriers' policies contained binding arbitration provisions, and others, including Allstate's, did not. Rather than allow for a result in which some carriers were sent to binding arbitration and other carriers were permitted to go to trial, the trial court simply ordered all parties to binding arbitration. However, once the *Scott-Pontzer* issues were resolved and Allstate was the only remaining insurance company, the reasoning behind the trial court's October 18, 2002, order for the parties to submit to binding arbitration became moot. These circumstances did not exist at the time the October 18, 2002, judgment entry was issued, but rather, only existed after the conclusion of the *Scott-Pontzer* appeals in August of 2005.

{¶27} Civ. R. 60(B) provides for motions to vacate, and states in pertinent part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: …(4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application…." As set forth in Allstate's reply motion to [appellant's] response to motion for case management schedule, the court ordered binding arbitration to determine the issues of liability and damages "presumably because of the large number of original defendants and unique issues of law

presented." Once the case became streamlined due to the resolution of the *Scott-Pontzer* issues, and the policies that contained mandatory arbitration clauses were no longer part of the case, the issues in the case between appellant and Allstate became much more limited. Thus, Civ. R. 60(B)(4) or even some other section of Civ. R. 60(B) may arguably provide a way for accomplishing the end sought by Allstate's motion for case management schedule.

{¶28} The Tenth District Court of Appeals' analysis in *Sherer v. AT&T Global Information Solutions, Co.* (Dec. 4, 1997), Franklin App. No. 97APE06-782, 1997 WL 752616, is instructive: "Had the trial court explicitly converted plaintiff's motion to a Civ. R. 60(B) motion, we would presume regularity in the trial court's proceedings in the absence of a transcript. Because, however, the record does not disclose whether the trial court treated plaintiff's motion as a motion for reconsideration or as a motion to vacate judgment under Civ. R. 60(B), we cannot engage in such an assumption. Instead, we vacate the trial court's May 15, 1997, entry and remand this matter to allow the trial court to consider the plaintiff's motion under the parameters set forth in this opinion. If the trial court deems plaintiff's motion to be a motion for reconsideration then the motion must be denied; however, if the court treats the motion as a Civ. R. 60(B) motion, the court may consider the evidence taken at the hearing, as well as the arguments of counsel, and determine whether the dictates of Civ. R. 60(B) are met in this case." Id. at *2.

{¶29} We are unable to determine from the record whether the trial court treated appellee's motion for case management schedule as a motion to modify/reconsider or as a 60(B) motion to vacate its October 18, 2002, order to arbitrate. Thus, I would

vacate the November 22, 2005 and December 21, 2005, judgments of the trial court, and remand this matter back to the trial court in order for the court to consider Allstate's motion for case management schedule under these parameters, and to make clear in the record how it is treating Allstate's motion for case management schedule.

{¶30} In addition, if the trial court treats the motion as a motion to vacate, fairness would indicate that the parties be allowed to brief said issue prior to the court's ruling, both in regard to the legal appropriateness of such treatment and as to whether the pleadings already filed by the parties support said treatment.

[Cite as *Welsh v. Indiana Ins. Co.*, 2006-Ohio-6803.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

KEITH WELSH, et al.	:	
Plaintiff	:	
and	:	JUDGMENT ENTRY
VENETA LALLI	:	
Appellant	:	CASE NO. 2005-CA-327
-vs-	:	
INDIANA INSURANCE COMPNAY, et al.	:	
Defendants	:	
and	:	
ALLSTATE INSURANCE COMPANY	:	
Appellee		

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings in accord with law and consistent with this opinion. Costs to appellee.

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HON: W. SCOTT GWIN

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HON: JULIE A. EDWARDS

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HON: JOHN F. BOGGINS