[Cite as *Napier v. Ickes*, 2015-Ohio-3500.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KATHERINE NAPIER, GUARDIAN, ET AL.

Plaintiffs-Appellants

-vs-

TERRY ICKES, ET AL.

Defendant-Appellee

-vs-

STATE FARM FIRE AND CASUALTY COMPANY

Intervenor-Appellee

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 14-CA-96

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 13 CV 217
JUDGMENT:	Dismissed
DATE OF JUDGMENT ENTRY:	August 24, 2015

APPEARANCES:

For Plaintiff-Appellant

SCOTT ELLIOT SMITH
Scott Elliot Smith, LPA
5003 Horizons Drive, Suite 200
Columbus, Ohio 43220

For Defendant-Appellee - Terry Ickes

WILLIAM SCOTT LAVELLE
Smith, Rolfes & Skavdahl,Co., LPA
65 East State Street, Suite 2000
Columbus, Ohio 43215

For Defendants-Appellees- Barry & Elizabeth Phillips

HARRY DIPIETRO
7 West Liberty Street
Girard, Ohio 44420

For Defendants-Appellees- Barry & Elizabeth Phillips

TIMOTHY J. RYAN
Gallagher, Gams, Pryor, Tallan & Littrell LLP
471 East Broad Street, 19th Floor
Columbus, Ohio 43215

For Defendant-Appellee-
Intervenor State Farm Fire & Casualty Company

JOHN F. MCLAUGHLIN
Rendings,Fry, Kiely & Dennis LLP
600 Vine Street, Suite 2650
Cincinnati, Ohio 45202

For Defendant-Appellee

HUNTER GRAY
51 Allison Drive
Heath, Ohio 43056

For Defendant-Appellee

BRADY WATTERS
132 North Court
Thornville, Ohio 43076

For Jerry Ickes

ROBERT H. WILLARD
529 South Third Street
Columbus, Ohio 43215

For Hunter Gray

ROBERT E. CALESARIC
Calesaric Law
35 South Park Place, Suite 150
Newark, Ohio 43055

For Hunter Gray

TODD M. ZIMMERMAN
Rohrbachers, Cron, Manahan,
Trimble, Zimmerman
655 Metro Place South, Suite 600
Dublin, Ohio 43017

Hoffman, P.J.

{¶1} Plaintiffs-appellants Katherine Napier, Guardian, et al. appeal the October 1, 2014 Nunc Pro Tunc Judgment Entry entered by the Licking County Court of Common Pleas, which granted summary judgment in favor of intervenor-appellee State Farm Fire and Casualty Company ("State Farm").

STATEMENT OF THE CASE AND FACTS[1]

{¶2} On February 28, 2013, Appellants filed a Complaint, naming Hunter Gray, State Farm's insured, as one of a number of defendants. The Complaint sought damages suffered by Appellant Frederick Alex Napier after Gray shot him using an emptied plastic shotgun shell, referred to as a "wad", as ammunition. On May 22, 2014, State Farm filed a motion to intervene, which the trial court granted.

{¶3} State Farm filed a motion for summary judgment on July 30, 2014, asking the trial court to declare no coverage existed covering Gray's act. Via Judgment Entry filed September 15, 2014, the trial court granted summary judgment in favor of State Farm, finding the harm suffered by Appellant Frederick Alex Napier was not accidental; therefore, not an occurrence as defined by the policy, and the exclusion for bodily injury that is expected or intended precludes coverage. State Farm filed a motion to amend the judgment entry to included Civ. R. 54(B) language. The trial court did so via a Nunc Pro Tunc Judgment Entry on October 1, 2014.

{¶4} It is from this judgment entry Appellants appeal, raising as error:

{¶5} "I. THE TRIAL COURT ERRED BY MISAPPLYING OHIO LAW AND FOUND NO QUESTION OF FACT EXISTED DEFENDANT HUNTER GRAY

[1] A complete Statement of the Facts is not necessary for our disposition of this appeal.

INTENDED THE INJURY PLAINTIFF-APPELLANT NAPIER SUFFERED WHEN GRAY DISCHARGED A WAD IN THE DIRECTION OF THE PLAINTIFF-APPELLANT."

I

{¶6} 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.

{¶7} 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. See, also, *Kallaus v. Allen*, 5th Dist. App. No. 09-CA-0002, 2009 -Ohio- 6339.

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

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur