MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Mark Waterfill and Aegean, LLC,

Appellants-

Defendants/Counterclaimants,

v.

Erie Insurance Exchange,

Appellee-Plaintiff/Counterclaim

Defendant.

February 12, 2021

Court of Appeals Case No. 20A-CP-1321

Appeal from the Marion Superior Court

The Honorable Marc T. Rothenberg, Judge

The Honorable Michael D. Keele, Special Judge

Trial Court Cause No. 49D07-1703-CT-10596 (Former and Consolidated Case No.: 49D13-1809-PL-38526)

Altice, Judge.

Case Summary

[1] Mark Waterfill and Aegean, LLC, (Aegean) (collectively, the Defendants) appeal from the trial court's grant of summary judgment in favor of Erie Insurance Exchange (Erie). Erie argues that the appeal is untimely and requests dismissal. Having reviewed the record, we conclude that dismissal is proper because the Defendants failed to timely appeal the trial court's entry of summary judgment.

[2] We dismiss.

Facts & Procedural History

[3] Erie filed a Complaint for Declaratory Judgment on March 15, 2017, against the Defendants and James Alsup in the Marion County Superior Court, Cause No. 49D07-1703-CT-10596 (Cause 10596), seeking a judgment that it owed no insurance coverage for allegations made in a separate lawsuit filed by Alsup against the Defendants[1] in Hendricks County (Alsup Lawsuit).[2] On July 13, 2017, Aegean filed a counterclaim alleging Erie acted in bad faith.[3]

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[1] Alsup also named Benesch, Friedlander, Coplan & Aronoff LLP (Benesch) as a defendant. Erie filed an amended complaint on March 23, 2017, to add Benesch as a party to the declaratory judgment action. On April 6, 2017, Benesch was dismissed from the declaratory judgment action with prejudice.

[2] This lawsuit was eventually transferred to the Marion County Superior Court under Cause No. 49D07-1902-PL-723.

[3] Aegean also filed a third-party complaint against its insurance agent, A.I. King Insurance Agency, Inc. On October 3, 2019, A.I. King was dismissed from the action.

[4] On September 25, 2018, Erie filed a second Complaint for Declaratory Judgment in the Marion Superior Court, Cause No. 49D14-1809-PL-38526, against the Defendants, Huizenga Manufacturing Company, and Public Agency Training Counsel, Inc., seeking a judgment that it owed no insurance coverage for allegations made in a separate lawsuit filed by Huizenga against the other named parties (Huizenga Lawsuit). On February 13, 2019, this second declaratory judgment action was consolidated with Cause 10596.

[5] On July 2, 2019, the trial court granted summary judgment in favor of Erie in connection with the Huizenga Lawsuit, ruling that Erie had no duty to defend or indemnify the Defendants as to the allegations made by Huizenga. That ruling disposed of all issues and all parties in the declaratory judgment action related to the Huizenga Lawsuit. No appeal was filed from that ruling.

[6] On October 28, 2019, Erie filed a motion for summary judgment relating to the Alsup Lawsuit against all remaining parties on Erie's complaint and against Aegean on its counterclaim. The court held a hearing on January 30, 2020. On February 25, 2020, the trial court entered an order granting summary judgment in favor of Erie as to all remaining parties and all remaining claims. Specifically, the trial court found that Erie owed no duty to defend or indemnify the Defendants as to the allegations in the Alsup Lawsuit. The court also found that Erie did not breach its duty of good faith and fair dealing and thus granted summary judgment in favor of Erie on Aegean's counterclaim. The court's summary judgment order was entered on the chronological case summary

(CCS) the same day. On February 26, 2020, the CCS noted that electronic notice of the summary judgment order was issued to the parties.

[7] On June 19, 2020, the Defendants filed with the trial court a motion for entry of final judgment pursuant to Ind. Trial Rule 54(B) or 58. The Defendants requested the court enter "a final judgment and a declaration/confirmation that the Court's February 25, 2020 Summary Judgment Order now constitutes a final, appealable order." *Motion to Dismiss Exhibit 11* at 2. The Defendants asserted that they had been "waiting for the Court to enter a final, appealable judgment under Trial Rule 58 so that they may file their notice of appeal" challenging the court's grant of summary judgment. *Id*. Erie filed a response to the Defendants' motion on June 24, 2020, arguing that the February 25, 2020 summary judgment order was a final judgment as it disposed of all claims and all parties and that the Defendant failed to timely appeal. On June 30, 2020, the trial court issued an order granting the Defendants' motion for entry of final judgment.

[8] On July 14, 2020, the Defendants filed their Notice of Appeal. Before briefing on the merits, Erie filed a verified motion to dismiss the appeal as untimely, to which the Defendants filed their response. By order of this court, the motion was held in abeyance. Herein, we address the merits of Erie's motion to dismiss.

Discussion & Decision

[9] This court has jurisdiction in all appeals from final judgments. *In re Estate of Botkins*, 970 N.E.2d 164, 166 (Ind. Ct. App. 2012) (citing Ind. Appellate Rule 5(A)). "A 'final judgment' is one which 'disposes of all claims as to all parties[.]'" *Id*. (quoting Ind. Appellate Rule 2(H)(1))[4]; *see also Bueter v. Brinkman*, 776 N.E.2d 910, 912-13 (Ind. Ct. App. 2002) (a final judgment is one that "disposes of all issues as to all parties, to the full extent of the court to dispose of the same, and puts an end to the particular case" and "reserves no further question or direction for future determination") (internal quotations and citations omitted). Whether an order is a final judgment governs the appellate court's subject matter jurisdiction. *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 757 (Ind. 2014) (citing *Georgos v. Jackson*, 790 N.E.2d 448, 451 (Ind. 2003)).

[10] The Defendants argue that the trial court's summary judgment order did not constitute a final, appealable judgment because it did not comply with T.R. 54(B) or T.R. 58. We begin with T.R. 54(B), which relates to entry of judgment in an action upon multiple claims or multiple parties. T.R. 54(B) provides:

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[4] App. R. 2(H) provides, as pertinent here:

> A judgment is a final judgment if:
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> (1) it disposes of all claims as to all parties;
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> (2) the trial court in writing expressly determines under Trial Rule 54(B) or Trial Rule 56(C) that there is no just reason for delay and in writing expressly directs the entry of judgment (i) under Trial Rule 54(B) as to fewer than all the claims or parties, or (ii) under Trial Rule 56(C) as to fewer than all the issues, claims or parties.

App. R. 2(H) contains three additional categories of final judgments, but they are not relevant to this case.

> When more than one [1] claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

T.R. 54(B) is applicable when the trial court's order does not dispose of all the issues as to all the parties. *See Snyder v. Snyder*, 62 N.E.3d 455, 458 (Ind. Ct. App. 2016) (noting that a trial court must include the "magic language" of T.R. 54(B) to convert an otherwise interlocutory order into an appealable final judgment). Here, however, the Defendants do not dispute that the court's February 25, 2020 summary judgment order disposed of all remaining claims and all parties. T.R. 54(B) is therefore inapplicable.

[11] The Defendants also argue that the summary judgment order was not a final appealable judgment because the court did not comply with the requirements of T.R. 58, which provides:

> (A) Entry of Judgment. Subject to the provisions of Rule 54(B), upon a verdict of a jury, or upon a decision of the court, the court shall promptly prepare and sign the judgment, and the clerk shall thereupon enter the judgment in the Record of Judgments and Orders and note the entry of the judgment in the Chronological Case Summary and Judgment Docket. A judgment shall be set forth on a separate document, except that *a judgment may appear upon the same document upon which appears the court's findings, conclusions, or opinion upon the issues*. The entry of the judgment shall not be delayed for the taxing of costs. Attorneys may submit suggested forms of judgment to the court, and upon request of

the court, shall assist the court in the preparation of a judgment, but the judgment shall not be delayed to await the resolution of issues by agreement of counsel. The judge failing promptly to cause the judgment to be prepared, signed and entered as provided herein may be compelled to do so by mandate.

(B) Content of Judgment. Except in small claims cases, a judgment shall contain the following elements:

> (1) A statement of the submission indicating whether the submission was to a jury or to the Court; whether the submission was upon default, motion, cross-claim, counterclaim or third-party complaint; and if the submission was to less than all issues or parties, such other matters as may be necessary to clearly state what issue is resolved or what party is bound by the judgment.
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> (2) A statement of the appearances at the submission indicating whether the parties appeared in person, by counsel, or both; whether there was a failure to appear after notice; and whether the submission was conducted by telephone conference.
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> (3) At the court's discretion and in such detail as it may deem appropriate, a statement of the court's jurisdiction over the parties and action and of the issues considered in sufficient particularity to enable any party affected by the judgment to raise in another action the defenses of merger, bar or claim or issue preclusion.
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> (4) A statement in imperative form which clearly and concisely sets forth the relief granted, any alteration of status, any right declared, or any act to be done or not done.

> (5) The date of the judgment and the signature of the judge.

(Emphasis supplied). The Defendants maintain that the summary judgment order was not a final appealable order because the trial court "did not enter a separate Judgment; the Court did not make reference to the RJO[5] in either the Summary Judgment Order or on the CCS; and the Court has not shown that it intended final judgment to be entered in this case." *Motion to Dismiss Exhibit 11* at 6.

[12] We conclude, however, that the trial court's summary judgment order clearly constituted an appealable final judgment. The trial court expressly granted summary judgment in favor of Erie on its complaint against the Defendants, finding that Erie owed no duty to defend or indemnify the Defendants against the allegations made in a separate lawsuit. The trial court also expressly granted summary judgment in favor of Erie on Aegean's counterclaim, finding that Erie did not breach its duty of good faith and fair dealing. Contrary to the Defendants' claim, Indiana law does not require a separate entry of "Final Judgment" to render an order granting summary judgment a final judgment. T.R. 58 expressly provides that a judgment "may appear upon the same document upon which appears the court's findings, conclusions, or opinion upon the issues," which is precisely how the court issued its judgment here.

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[5] Record of Judgments and Orders.

Further, the summary judgment order was noted on the CCS and notice was provided to the parties. Again, we note that the Defendants do not dispute that the court's summary judgment order disposed of all claims as to all parties—which is the definition of a final judgment under the appellate rules. *See* App. R. 2(H).

[13] Given that the summary judgment order was a final order, the thirty-day time limit for initiating an appeal from the trial court's decision began to run on February 25, 2020. *See* Ind. Appellate Rule 9(A)(1). Under normal circumstances, the Defendants would have had to file their notice of appeal by March 26, 2020. Due to the national health emergency created by COVID-19, our Supreme Court tolled the time limits for the filing of a notice of appeal. By order of the Supreme Court, dated March 25, 2020, filings due on or between March 23, 2020 and April 6, 2020 were due on April 21, 2020. The Defendants did not file their notice of appeal until July 14, 2020.

[14] In sum, the trial court's summary judgment order fulfilled the definition of "Final Judgment" because it disposed of all issues as to all parties and it put an end to the declaratory judgment action without reserving any further question for future determination. Having not timely filed a notice of appeal from that

decision, the Defendants forfeited their right to appeal.[6] *See In re Adoption of O.R.*, 16 N.E.3d 965, 971 (Ind. 2014).

[15] Appeal dismissed.

Mathias, J. and Weissmann, J., concur.

[6] Forfeiture is "[t]he loss of a right, privilege, or property because of a ... breach of obligation[ ] or neglect of duty." *In re Adoption of O.R.*, 16 N.E.3d 965, 970 (Ind. 2014) (quoting Black's Law Dictionary 765 (10th ed. 2014)). We can opt to decide a forfeited appeal on the merits where "there are extraordinarily compelling reasons why this forfeited right should be restored." *Id*. at 971. The Defendants do not present, nor do we find, compelling reasons to reinstate their forfeited right to appeal.