[Cite as *Nationwide Mut. Fire Ins. Co. v. Wooten*, 2018-Ohio-4587.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PIKE COUNTY

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,	:	Case No. 18CA889
Plaintiff-Appellant,	:	
v.	:	DECISION AND JUDGMENT ENTRY
JOSHUA K. WOOTEN,	:	
Defendant-Appellee.	:	**RELEASED: 11/05/2018**

APPEARANCES:

Lavell O. Payne, Richfield, Ohio, and A. Kathleen Locurto, Columbus, Ohio, for appellant.

Michael L. Benson and Mark D. Tolles, II, Benson & Sesser, L.L.C., Chillicothe, Ohio, for appellee.

Harsha, J.

{¶1} Nationwide Mutual Fire Insurance Company appeals the summary judgment granted to Joshua K. Wooten on its claim for indemnification of a $10,000 payment Nationwide made to Allstate, Wooten's insurer. Nationwide contends the trial court erred as a matter of law by failing to enforce its indemnification agreement with Wooten.

{¶2} We reject Nationwide's assertion because the agreement only required indemnification for any then-existing or thereafter acquired interest. When Wooten executed the agreement, Allstate's potential subrogation lien for medical payments had been settled. Moreover, Allstate's subrogation claim for medical payments was subject to the R.C. 2305.10(A) two-year statute of limitations, and when Nationwide and Wooten executed the settlement agreement, that period had already expired. Finally,

Allstate's filing of an inter-company arbitration claim against Nationwide for subrogation of Allstate's medical payments to Wooten did not toll the two-year statute of limitations.

{¶3} Because Allstate's subrogation claim no longer existed at the time Wooten entered into its settlement agreement with Nationwide, Wooten did not breach that agreement by refusing to indemnify Nationwide for the medical payments he received from Allstate. We overrule Nationwide's assignment of error and affirm the summary judgment.

{¶4} But because we are not persuaded that this appeal is frivolous, we deny Wooten's motion for sanctions.

I. FACTS

{¶5} In July 2017, Nationwide filed a complaint in the Pike County Court of Common Pleas seeking enforcement of a settlement agreement with Joshua K. Wooten. Nationwide alleged Wooten had to pay it $10,000 as reimbursement for the money it paid Wooten's insurer, Allstate, for medical payments Allstate paid to Wooten. Wooten's answer denied most of the allegations of Nationwide's complaint and argued that Nationwide's claim was barred by several defenses, including the statute of limitations. Nationwide and Wooten each filed motions for summary judgment.

{¶6} The parties' pleadings and summary judgment materials establish the following facts. In January 2014, Wooten was injured in an automobile accident caused by Brandon DeLong. At the time of the accident, Allstate Property and Casualty Insurance Company ("Allstate"), insured Wooten for his medical payments arising from the accident; Nationwide insured DeLong. In accordance with its policy, Allstate made $10,000 in medical payments to Wooten.

{¶7} In April 2014, Allstate wrote to Nationwide asserting: (1) its investigation revealed that DeLong, Nationwide's insured, was at fault for the accident; (2) Allstate had settled its medical payment claim with its insured, Wooten; (3) Allstate had the right to subrogation for medical payments coverage in the amount of $10,000; and (4) Allstate requested that Nationwide pay Allstate $10,000 for its subrogation claim. A few months later Allstate sent a letter to Wooten's attorneys stating that it would "negotiate directly with the responsible party and/or their insurance carrier for the recovery of any benefit payments we make on behalf of your client * * *(.)"

{¶8} Nationwide refused to pay Allstate the $10,000 for the medical payments. So Allstate initiated an arbitration proceeding in December 2015 against Nationwide through Arbitration Forums, Inc. Wooten was not a party in the inter-company arbitration proceeding and did not appear or participate in it.

{¶9} Then in January 2016 Wooten filed a complaint against DeLong in the Pike County Common Pleas Court seeking damages for bodily injury caused by the January 2014 accident. Allstate was not a party in the case. In November 2016 Wooten entered into a settlement agreement with DeLong and his insurer, Nationwide, for $45,000 to release his claims against them. Wooten and Nationwide did not execute the release until January of 2017. As part of the settlement agreement Wooten agreed to "indemnify * * * **the medical payments liens of * * * Plaintiff's Auto Medpay carrier** * * * whether presently existing or hereafter acquired * * *." (Emphasis sic.)

{¶10} In December 2016, before the parties executed the settlement agreement, Arbitration Forums, Inc. issued an arbitration award in favor of Allstate and against Nationwide for $10,000 on Allstate's subrogation claim for medical payments.

{¶11} The trial court ultimately granted Wooten's motion for summary judgment and denied the motion on Nationwide's behalf. The court determined that: (1) there was no evidence that Wooten's insurance contract with Allstate provided for the right of subrogation for medical payments; (2) Allstate did not have a valid subrogation claim at the time Wooten executed his release because the two-year statute of limitations had expired; and (3) Allstate's commencement of arbitration proceedings against Nationwide did not toll the statute of limitations, and Wooten was not bound by those proceedings.

II. ASSIGNMENT OF ERROR

{¶12} Nationwide assigns the following error for our review:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEE, JOSHUA K. WOOTEN, BECAUSE IT FAILED TO TREAT THE SETTLEMENT AGREEMENT AS A BINDING CONTRACT AND, THEREFORE, FAILED TO ENFORCE THE TERMS FOUND WITHIN THE SETTLEMENT AGREEMENT'S FOUR CORNERS, AS REQUIRED BY LAW.

III. STANDARD OF REVIEW

{¶13} Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R. 56. *Vacha v. N. Ridgeville*, 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126, ¶ 19. Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact, (2) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made and (3) the moving party is entitled to judgment as a matter of law. Civ.R. 56; *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Chase Home Finance, LLC v. Dunlap*, 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484, ¶ 26.

{¶14} The moving party has the initial burden of informing the trial court of the basis for the motion by pointing to summary judgment evidence and identifying parts of the record that demonstrate the absence of a genuine issue of material fact on the pertinent claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *Chase Home Finance* at ¶ 27. Once the moving party meets this initial burden, the nonmoving party has the reciprocal burden under Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue remaining for trial. *Dresher* at 293, 662 N.E.2d 264.

IV. LAW AND ANALYSIS

A. Appeal

{¶15} Nationwide asserts that the trial court erred in granting summary judgment to Wooten on its action to enforce the indemnity provision of their settlement agreement. A settlement agreement is a contract designed to terminate a claim by preventing or ending litigation; because a settlement agreement constitutes a binding contract, a trial court is authorized to enforce the agreement in a pending lawsuit. *See Infinite Security Solutions, L.L.C. v. Karam Properties, II, Ltd.*, 143 Ohio St.3d 346, 2015-Ohio-1101, 37 N.E.3d 1211, ¶ 16. Here, the settlement included an indemnity agreement whereby Wooten agreed to indemnify Nationwide for existing or thereafter acquired medical payment liens incurred on his behalf by Allstate.

{¶16} Although neither party presented evidence of the insurance policy Allstate issued to Wooten, Nationwide presented evidence of an April 2014 letter from Allstate to Nationwide stating that Allstate had the right to subrogation for $10,000 in medical payments it had paid to Wooten under its policy. " 'It is common knowledge that a

plaintiff holding an automobile liability policy providing for medical benefits is entitled to those payments when injured in an automobile accident and * * * is also entitled to recover * * * from the tort-feasor.' " *Smith v. Travelers Ins. Co.*, 50 Ohio St.2d 43, 46, 362 N.E.2d 264 (1977), quoting *Wilson v. Tenn. Farmers Mut. Ins. Co.*, 411 S.W.2d 699, 701-702 (Tenn.1966).

{¶17} Nevertheless, in that same letter Allstate emphasized that it had settled its medical-payment claim with Wooten.

{¶18} In a separate 2014 letter to Wooten's attorneys a few months later, Allstate stated that it would negotiate directly with DeLong and/or Nationwide "for the recovery of any benefit payments" it made on behalf of Wooten.

{¶19} Thus there is uncontroverted evidence that in 2014, any subrogation claim Allstate had against Wooten was settled, and that Allstate was instead seeking to recover the medical payments from Nationwide. When Wooten signed the indemnification provision in January 2017 there was no existing subrogation right for Allstate, nor was one thereafter acquired. Therefore the trial court did not err by granting summary judgment to Wooten.

{¶20} Moreover, this result would not change if a genuine issue of fact remained about whether Allstate had settled any subrogation claim with its insured, Wooten. "[A]n insurer-subrogee cannot succeed to or acquire any right or remedy not possessed by its insured." *Chemtrol Adhesives, Inc. v. Am. Mfg. Mut. Ins. Co.*, 42 Ohio St.3d 40, 42, 537 N.E.2d 624 (1989); *Acuff v. Motorists Mut. Ins. Co.*, 10th Dist. Franklin No. 06AP-613, 2007-Ohio-938, ¶ 15. Here the statute of limitations had run.

{¶21} In *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814, at ¶ 25, the Supreme Court of Ohio discussed subrogation in the insurance context and observed that the insurer-subrogee has no greater rights than its insured-subrogor, so the insurer was also subject to any applicable statute of limitations:

> Subrogation generally is "[t]he substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor." Black's Law Dictionary (9th Ed.2009) 1563–1564. Insurance is the context in which subrogation most commonly arises. In that context, subrogation is "[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy." *Id*. at 1564. In the insurance context, "[a] subrogated insurer stands in the shoes of the insured-subrogor and has no greater rights than those of its insured-subrogor. * * * Further, where the insured's claim against a tortfeasor is based on negligence, the insurer's subrogated claim is also necessarily based on negligence, rather than on the insurance contract. * * * Consequently, where an insured's tort claim is subject to a statute of limitations, so too is the insurer's subrogated claim." *Nationwide Mut. Ins. Co. v. Zimmerman,* 5th Dist. No. 2004 CA 00007, 2004-Ohio-7115, 2004 WL 3038032, ¶ 16; see *Corn,* 183 Ohio App.3d 204, 2009-Ohio-2737, 916 N.E.2d 838, at ¶ 35 ("in the insurance context, subrogation is derivative in nature, and no new cause of action is created").

{¶22} Because Wooten's claim against DeLong was based on negligence, so was Allstate's. *McKinley* at ¶ 25. Consequently, the applicable statute of limitations for the subrogation claim was the two-year statute of limitations of R.C. 2305.10(A) ("an action for bodily injury * * * shall be brought within two years after the cause of action accrues. * * * a cause of action accrues under this division when the injury or loss to person * * * occurs"). *See Nationwide Mut. Fire Ins. Co. v. Buckley*, 9th Dist. Medina No. 06CA0013-M, 2006-Ohio-5362, ¶ 14.

{¶23} The uncontroverted summary judgment evidence established that the automobile accident occurred in January 2014, so Wooten and Allstate had to file their claims by January 2016. Although Wooten did file a complaint against DeLong by that date, Allstate did not participate in that litigation, and Allstate did not file a civil action on its subrogation claim before the expiration of the two-year statute of limitations. Therefore, when Wooten executed the agreement in January 2017 to indemnify Nationwide for medical payment liens, Allstate had no existing subrogation claim because the statute of limitations had already run. *Buckley* at ¶ 17 (affirming trial court's entry of summary judgment in favor of insured because insurer failed to pursue its right of subrogation at a time in which the right existed).

{¶24} Finally, Allstate's initiation of an inter-company arbitration claim against Nationwide for subrogation did not toll the two-year statute of limitations because it did not constitute a proper commencement of a civil action:

> {¶ 16} Section 2305.10 of the Revised Code sets forth the statute of limitations for causes of actions based on bodily injury and provides that "an action for bodily injury or injuring personal property shall be brought within two years after the cause of action accrues." R.C. 2305.10. The statute further states that "a cause of action accrues under this division when the injury or loss to person or property occurs." *Id.* It is undisputed by the parties that the accident giving rise to this suit occurred on February 24, 2001, and that Guide One submitted its subrogation claim against Nationwide to inter-company arbitration on February 8, 2003-within the two-year timeframe.
>
> {¶ 17} However, as noted by the trial court, R.C. 2305.17 expressly defines what constitutes a commencement of an action within the statute of limitations for claims based on bodily injury and provides:
>
> > ***An action is commenced within the meaning of sections 2305.03 to 2305.22* and sections 1302.98 and 1304.35 of the Revised Code *by filing a petition in the office of the clerk of the proper court together with a praecipe demanding that summons issue or an affidavit for***

> ***service by publication,*** **if service is obtained within one year.**
>
> (Emphasis added).
>
> {¶ 18} Here, Guide One did not file a petition with the office of the clerk of courts as required by the statutory language cited above. Rather, Guide One filed notice with a third-party private organization, Arbitration Forums, Inc., to provide Nationwide notice of its subrogation claim. In addition, Nationwide cites us to no authority in support its contention that Guide One's submission of its subrogation claim to inter-company arbitration constitutes a commencement of an action within the meaning of R.C. 2305.17. * * *

Nationwide Mut. Fire Ins. Co. v. Delacruz, 3d Dist. Hancock No. 5-10-17, 2010-Ohio-6068, ¶ 16-18.

{¶25} This result is also dictated by the undisputed fact that Wooten did not participate in and had no notice of the arbitration proceeding, and thus could not be bound by it. *See, e.g., Brown v. Gallagher*, 2013-Ohio-2323, 993 N.E.2d 415, ¶ 13 (4th Dist.).

{¶26} In its reply brief Nationwide cites our decision in *Motorist Ins. Companies v. Shields*, 4th Dist. Athens No. 00CA26, 2001 WL 243285 (Jan. 29, 2001), which upheld a release and indemnification agreement. That case is distinguishable because, among other reasons, the insured accident victims "waived the statute of limitations issue" by failing to timely raise it in their answer to the action to enforce the agreement. Conversely, Wooten timely raised the statute of limitations defense in his answer.

{¶27} Because no valid subrogation claim for medical payments existed in January 2017 when Wooten executed the release, or was acquired thereafter by Allstate, the trial court properly entered summary judgment in Wooten's favor. We overrule Nationwide's assignment of error.

B. Motion for Sanctions

{¶28} In his brief Wooten seeks sanctions against Nationwide under App.R. 23, which provides that "if a court of appeals shall determine that an appeal is frivolous, it may require the appellant to pay reasonable expenses of the appellee including attorney fees and costs."

{¶29} "The purpose of sanctions under App.R. 23 is to compensate the non-appealing party for the expense of having to defend a spurious appeal, and to help preserve the appellate calendar for cases truly worthy of consideration." *Dailey v. Uhrig*, 4th Dist. Ross No. 06CA2911, 2008-Ohio-1396, ¶ 25, quoting *Tessler v. Ayer*, 108 Ohio App.3d 47, 58, 669 N.E.2d 891 (1st Dist.1995). "Ohio courts have generally considered an appeal frivolous where, in whole or in part, it presents no reasonable question for review." *Uhrig* at ¶ 26, citing *Patton v. Ditmyer*, 4th Dist. Athens Nos. 05CA12, 05CA21, and 05CA22, 2006-Ohio-7107, ¶ 99. The decision of whether to award attorney's fees for frivolous conduct rests within the sound discretion of this court. *Patton* at ¶ 99.

{¶30} Wooten argues that this appeal is frivolous based on the decisions of other appellate courts involving Nationwide in *Delacruz*, 2010-Ohio-6068, and *Zimmerman*. 2004-Ohio-7115. But these cases, while persuasive, are not binding in our district. *See Stapleton v. Holstein*, 131 Ohio App.3d 596, 598, 723 N.E.2d 164 (4th Dist.1998) ("Only Ohio Supreme Court decisions and reported opinions of this court are binding upon trial courts of this district"). And although we have ultimately decided to cite them here, we cannot conclude that Nationwide's argument on appeal presented no reasonable question for review. Accordingly, we deny Wooten's motion for sanctions.

V. CONCLUSION

{¶31} Having overruled Nationwide's assignment of error, we affirm the judgment of the trial court. We deny Wooten's motion for sanctions.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.