[Cite as *Burris v. State Farm Fire & Cas. Co.*, 2009-Ohio-5123.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Troy A. Burris et al.,	:	
Plaintiffs-Appellants,	:	
		No. 08AP-1113
v.	:	(C.P.C. No. 07CVH08-10759)
State Farm Fire & Casualty Company,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 29, 2009

Buckley King, LPA, and *Richard D. Brown*, for appellants.

Zeehandelar, Sabatino & Associates, LLC, *Steven J. Zeehandelar* and *Alessandro Sabatino, Jr.*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiffs-appellants, Troy A. Burris and Carlos Fornaris, appeal from a judgment of the Franklin County Court of Common Pleas granting judgment to defendant-appellee, State Farm Fire & Casualty Company ("State Farm"). For the following reasons, we affirm that judgment.

{¶2} In 2002, appellants were driving in Burris's car when a car driven by Heath Shaffer ("Shaffer") struck them from behind, causing appellants serious injuries. As a result, appellants filed a civil action for damages against Shaffer in the Franklin County

Court of Common Pleas. State Farm intervened in that case alleging a right of subrogation. State Farm sought to recover $16,428.41 in medical payments it made on behalf of appellants pursuant to Burris's insurance policy with State Farm.

{¶3} The trial court eventually referred the case to arbitration pursuant to Loc.R. 103 of the Franklin County Court of Common Pleas, General Division. Pursuant to that rule, an arbitrator's report and award is final unless any party files an appeal within 30 days of the filing of the report and award. If any party files an appeal, the trial court shall hold a de novo trial on all issues. Absent an appeal, the trial court shall enter judgment on such report and award. Loc.R. 103(13).

{¶4} Here, the arbitration panel filed a report and award on August 4, 2005. The arbitrators awarded $75,000 to Burris and $55,000 to Fornaris. An award of $16,428.41 to State Farm was crossed out. Therefore, State Farm did not receive an award for the amount of its medical payments. It is unclear whether the arbitration panel rejected State Farm's claim or whether it intended that State Farm's claim would be satisfied out of the amount awarded to appellants.

{¶5} Thereafter, State Farm's attorney, Alessandro Sabatino, Jr., had a telephone conversation with appellants' attorney, Richard D. Brown, concerning the report and award. Sabatino's computer log notes contain the following entry dated August 5, 2005:

> Spoke to Insured's atty, Rich Brown * * *, he is happy w/ result, but doesn't know if clients will be as he just rc'd it. Explained that I HAVE To appeal if I don't get something from him agreeing to pay us since SF was technically awarded zero. Told him he needs to let me know if he can provide something in writing b/c I don't want to be the one to appeal an award he and/or clients are happy w/.

{¶6} On August 31, 2005, as the 30-day deadline to appeal the report and award approached, Sabatino and Brown had another telephone conversation in which Brown advised Sabatino that Shaffer's attorney, Bill Kloss, intended to appeal the report and award. Sabatino had a separate discussion with Kloss in which Kloss confirmed that he intended to appeal the report and award.

{¶7} Sabatino's computer log notes contain the following entries from August 31, 2005:

> Called Rich [plaintiffs' attorney]. Defendant's atty [Bill Kloss] is going to appeal the award. He [Rich Brown] will nonetheless send me an E-mail confirming that if the award is not appealed, he will satisfy our lien.
>
> Spoke to Bill [K]loss who said he was going to file an appeal.
>
> Rc'd E-mail from Rich Brown confirming that he will protect our interest, sent him a confirming E-mail.[1]

{¶8} On the same day, Sabatino and Brown exchanged e-mails on this subject. Brown wrote:

> Al,
>
> Per our conversations, this is to advise that Plaintiffs in the above-referenced matter will protect State Farm's subrogation claim. As I advised, Defendant intends to appeal the arbitration award. Please contact me if you have any questions.

{¶9} In response, Sabatino wrote:

> Rich,
>
> Thanks for the E-mail. Based on same, I will refrain from filing an objection to the Arbitration Decision which did not list an award for my client, State Farm. This, however, appears

[1] The parties stipulated that Sabatino's notes reflect his interpretation and belief as to what Brown said to him during that telephone conversation on August 31, 2005.

> moot as Attorney Kloss confirmed during my subsequent conversation with him that he will, in fact, be appealing the award.

{¶10} Based upon these communications, Sabatino did not appeal the report and award. For whatever reason, Kloss also did not appeal the report and award.

{¶11} Sabatino contacted Brown when Sabatino discovered that Kloss did not appeal the report and award. Sabatino's computer log notes contain the following entry dated September 21, 2005:

> Called Rich Brown who advised that he will take care of our claim as he agreed but felt he needed to ask if SF wd make any reduction. Told him highly unlikely since he rc'd such a nice award.

{¶12} Because no party appealed the report and award, the trial court filed a judgment entry on October 3, 2005 granting judgment to appellants in accordance with the report and award. The trial court's judgment entry, like the report and award, neither mentioned State Farm's subrogation claim nor awarded any money to State Farm.

{¶13} On or about October 25, 2005, Brown received two checks from Shaffer's liability carrier, one in the amount of $75,000 in satisfaction of the judgment for Burris, and one in the amount of $55,000 in satisfaction of the judgment for Fornaris. Brown placed $16,428.41 of the proceeds into his law firm's trust account.

{¶14} In a letter dated November 2, 2005, Brown advised Sabatino that he had protected State Farm's alleged lien by placing the disputed amount, $16,428.41, into his firm's trust account. Brown also indicated in the letter that he did not believe State Farm was entitled to any of the proceeds.

{¶15} Thereafter, appellants filed the instant case in the Franklin County Court of Common Pleas seeking a declaration of the parties' rights regarding the disputed

$16,428.41. In response, State Farm filed a counterclaim seeking to recover the $16,428.41 based on promissory estoppel and State Farm's alleged contractual right of reimbursement.

{¶16} The parties submitted the dispute to the trial court on briefs and stipulated facts. In support of its promissory estoppel claim, State Farm argued that it did not appeal the report and award based upon its reasonable reliance on Brown's promise that appellants would pay State Farm's $16,428.41 lien if neither Shaffer nor State Farm filed an appeal. Appellants claimed that State Farm misinterpreted Brown's promise. Appellants argued that Brown's promise to "protect" State Farm's lien did not mean that appellants would pay State Farm the $16,428.41. Appellants also claimed that State Farm was not entitled to recover its medical payments based on the "make-whole" doctrine.

{¶17} The trial court found that appellants' counsel "agreed to protect State Farm's interest with the knowledge that State Farm would rely on that agreement and would thus let their claims against the tortfeasor lapse." Accordingly, the trial court entered judgment in favor of State Farm on its promissory estoppel claim.

{¶18} Appellants appeal and assign the following errors:

> [1.] THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY APPLYING THE DOCTRINE OF PROMISSORY ESTOPPEL BECAUSE, UNDER THE UNDISPUTED FACTS OF THIS CASE, THAT DOCTRINE IS NOT APPLICABLE.
>
> [2.] THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING JUDGMENT IN FAVOR OF DEFENDANT-APPELLEE ON THE PARTIES' STIPULATION OF FACTS AND TRIAL BRIEFS, BECAUSE DEFENDANT-APPELLEE WAS NOT ENTITLED TO JUDGMENT IN ITS FAVOR, AS PLAINTIFFS'-APPELLANTS' AGREEMENT TO PROTECT DEFENDANT-APPELLEE'S SUBROGATED

> CLAIM WAS NOT TANTAMOUNT TO AN AGREEMENT TO PAY THE SAID SUBROGATED CLAIM, AND, AS PLAINTIFFS-APPELLANTS WERE ENTITLED TO JUDGMENT IN THEIR FAVOR ON THE BASIS OF THE "MAKE WHOLE DOCTRINE."

{¶19} Because appellants' assignments of error address the same issues, we will consider them together. Appellants first argue that the trial court erred by entering judgment in State Farm's favor on its promissory estoppel claim. We disagree.

{¶20} The core factual issue presented to the trial court was the precise nature of Brown's promise to Sabatino. Appellants' entire argument is premised solely on the promise contained in Brown's August 31, 2005 e-mail ("Plaintiff's * * * will protect State Farm's subrogation claim"). Appellants ignore the telephone conversations that occurred between Brown and Sabatino. Although this case was presented to the trial court on stipulated facts, the parties did not stipulate to what Brown promised Sabatino during their several telephone conversations. Therefore, based upon the evidence submitted, the trial court had to determine the nature of Brown's oral promise to resolve State Farm's promissory estoppel claim. Appellants now dispute the factual basis for that determination. In essence, appellants challenge the weight of the evidence supporting the trial court's judgment.

{¶21} As to civil judgments, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. See also *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80 (stating that "an appellate court should not substitute its judgment for that of the trial court when there exists * * * competent and

credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge"). When reviewing whether a civil judgment is against the manifest weight of the evidence, an appellate court is guided by a presumption that the findings of the trier of fact were correct. Id. at 79-80.

{¶22} The doctrine of promissory estoppel requires the demonstration of the following elements: (1) a clear, unambiguous promise; (2) reliance upon the promise by the promisee; (3) reasonable and foreseeable reliance; and, (4) the person claiming reliance is injured as a result of the reliance. *Hoyt v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 04AP-941, 2005-Ohio-6367, ¶44, citing *Weiper v. W.A. Hill & Assoc.* (1995), 104 Ohio App.3d 250, 260.

{¶23} Appellants first dispute that Brown made a clear and unambiguous promise. A clear and unambiguous promise is the type that a promisor would expect to induce reliance. *Casillas v. Stinchcomb*, 6th Dist. No. E-04-041, 2005-Ohio-4019, ¶19. Appellants claim that Brown only promised to protect State Farm's subrogation claim. According to appellants, protecting State Farm's subrogation claim meant that Brown would place the disputed funds in his firm's escrow account and then Brown would allow State Farm an opportunity to prove to Brown its entitlement to the money. At worst, appellants claim that any uncertainty about the meaning of Brown's promise supports their contention that the promise was not clear and unambiguous. State Farm argues that Brown made a clear and unambiguous oral promise to pay State Farm's lien if neither State Farm nor the tortfeasor appealed the report and award. The trial court resolved this factual dispute when it ruled in favor of State Farm. Competent and credible evidence supports that finding.

{¶24} Significantly, Sabatino's August 31, 2005 log note indicates that he understood Brown to orally promise that appellants would pay State Farm's $16,428.41 lien if no one appealed the report and award. Sabatino's notes are competent, credible evidence upon which the trial court could rely in making a factual finding. Although appellants argue that the notes were just Sabatino's impressions of his conversations with Brown, the notes are nevertheless competent, credible evidence that Brown made a clear and unambiguous oral promise that appellants would pay State Farm the amount of its lien if no one appealed the report and award. Further, Sabatino's log note of September 21, 2005 reflects another telephone conversation between Sabatino and Brown. According to the note, Brown acknowledged during this conversation his promise that appellants would pay State Farm's claim. Again, this log note is competent, credible evidence that Brown made a clear and unambiguous promise to pay State Farm's claim if no one appealed the report and award. Simply because appellants dispute that Brown made this oral promise does not prevent the trial court from finding otherwise.

{¶25} Next, appellants argue that Sabatino unreasonably relied on Brown's promise. We disagree. Attorneys are under ethical and professional considerations not to knowingly make false statements to third persons. Prof.Con.R. 4.1(a). Moreover, it is professional misconduct for an attorney to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Prof.Con.R. 8.4(c). Therefore, when an attorney makes a promise to another attorney on behalf of a client, it is reasonable for the other attorney to rely on that promise. It is also foreseeable that such a promise would induce reliance. We do not mean to suggest in any way that Brown engaged in professional misconduct.

We simply find that there was competent, credible evidence that Sabatino's reliance on Brown's promise was reasonable and foreseeable.[2]

{¶26} Because there is competent, credible evidence supporting the trial court's judgment, the judgment is not against the manifest weight of the evidence.

{¶27} Appellants next claim that the "make-whole" doctrine bars State Farm's recovery. We disagree.

{¶28} The make-whole doctrine provides that "where an insured has not interfered with an insurer's subrogation rights, the insurer may neither be reimbursed for payments made to the insured nor seek setoff from the limits of its coverage until the insured has been fully compensated for his injuries." *James v. Michigan Mut. Ins. Co.* (1985), 18 Ohio St.3d 386, 388 (emphasis omitted); *Clark v. Auto-Owners Mut. Ins. Co.*, 10th Dist. No. 05AP-751, 2006-Ohio-2436, ¶10. Thus, as a general rule, an insured must be "made whole" before the insurer may claim reimbursement. *Acuff v. Motorists Mut. Ins. Co.*, 10th Dist. No. 06AP-613, 2007-Ohio-938, ¶21.

{¶29} The make-whole doctrine is inapplicable in this case because the trial court granted judgment to State Farm on its promissory estoppel claim, not its claim for reimbursement. State Farm's promissory estoppel claim was not based on its contractual reimbursement rights but on Brown's promise that caused State Farm to give up its right to a de novo review of its subrogation claim. Therefore, appellants arguably interfered with State Farm's subrogation rights. Appellants have not directed this court to any cases

[2] Although not challenged by appellants, we also note that there was competent, credible evidence that State Farm suffered injury as a result of its reasonable reliance on Brown's promise. Based upon Brown's promise, State Farm gave up its right to appeal the report and award—an appeal that would have entitled State Farm to a de novo review of its subrogation claim.

in which a court has applied this doctrine to bar recovery on a promissory estoppel claim. We decline to extend the doctrine to such a claim.

{¶30} Even if the make-whole doctrine applied in this case, the voluntary settlement by an insured of his claims against a tortfeasor, without proof to the contrary, is persuasive evidence of the value of the insured's personal injury claim, and tends to prove that the insured was fully compensated for his injuries. *Erie Ins. Co. v. Kaltenbach* (1998), 130 Ohio App.3d 542, 547, citing *Risner v. Erie Ins. Co.* (1993), 91 Ohio App.3d 695, 699; *Palmer v. Grange Mut. Cas. Co.*, 11th Dist. No. 2008-T-0124, 2009-Ohio-3939, ¶40.

{¶31} Although this case does not involve a settlement, appellants could have appealed the report and award if they were dissatisfied. An appeal would have entitled appellants to a trial de novo. Loc.R. 103(14). Instead, appellants allowed the report and award to become final. Appellants' decision not to appeal the report and award is analogous to a plaintiff's decision to enter into a settlement agreement with a tortfeasor. Just like the situation where a plaintiff settles his or her claims against a tortfeasor instead of proceeding to a trial, appellants chose to accept the report and award and resolve their claims against Shaffer instead of proceeding to a de novo trial. Therefore, just like a settlement agreement, the decision not to appeal a report and award pursuant to Loc.R. 103 is persuasive evidence that the report and award fully compensated appellants for their injuries. See *Allen v. Binckett*, 5th Dist. No. CT2008-0027, 2009-Ohio-2969, ¶24-29 (settlement with tortfeasor prohibited plaintiffs from arguing they were not made whole).

{¶32} For these reasons, the make-whole doctrine does not require reversal of the trial court's judgment.

{¶33} The trial court did not err by entering judgment in favor of State Farm on its promissory estoppel claim. Accordingly, we overrule appellants' two assignments of error and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, P.J., and McGRATH, J., concur.