

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

QualChoice, Inc.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 09AP-780 (M.C. No. 2008 CVE 022093)
Nationwide Insurance Co.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 30, 2010

Kreiner & Peters Co., LPA, and Shaun D. Byroads, for appellant.

Jill K. Mercer, for appellee.

APPEAL from the Franklin County Municipal Court.

McGRATH, J.

{¶1} Plaintiff-appellant, Qualchoice, Inc. ("appellant"), appeals from the judgment of the Franklin County Municipal Court in favor of defendant-appellee, Nationwide Insurance Co. ("appellee"), entered after a trial to the bench.

{¶2} Appellant is a health insurer who paid medical claims on behalf of three of its insureds. In its three-count complaint filed on May 15, 2008, appellant sought no fault medical payment coverage from appellee who insured the premises or automobiles involved in the incidents. In the aggregate, appellant sought judgment in the amount of \$5,662.31. On September 4, 2008, appellee filed an answer including a request for a jury

demand. Cross-motions for summary judgment were filed, and the trial court denied the motions via entry filed May 14, 2009. A bench trial was held on May 20, 2009, and at the close of appellant's case-in-chief, the trial court dismissed count one of the complaint. After the submission of post-trial memoranda, the trial court rendered a decision on July 16, 2009, finding appellant was not entitled to recovery, and entered judgment in favor of appellee.

{¶3} This appeal followed, and appellant brings the following four assignments of error for our review:

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALL COUNTS BY TRYING THIS MATTER BEFORE THE BENCH WHEN A JURY TRIAL WAS DEMANDED AND NOT WAIVED PURSUANT TO OHIO CIVIL RULE OF PROCEDURE 39(A).
2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DISMISSING COUNT I UNDER OHIO CIVIL RULE OF PROCEDURE 41(B)(2).
3. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN COUNTS I AND III BY HOLDING A MEDICARE HMO HEALTH PLAN DOES NOT PREEMPT A STATE LAW CONTRACT PROVISION.
4. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN COUNT II BY PLACING THE BURDEN ON PLAINTIFF/APPELLANT TO PROVE "MEDICAL NECESSITY" WHEN NATIONWIDE'S CONTRACT PLACES BURDEN ON NATIONWIDE.

{¶4} Before we address appellant's assignments of error, we must first address appellant's motion to supplement the record with the first 20 pages of trial transcript to which appellee has filed a memorandum contra. Upon review and in the interest of justice, appellant's motion to supplement the record is granted.

{¶5} In its first assignment of error, appellant contends the trial court erred in failing to provide a jury trial where a proper demand for a jury trial was made and there is no waiver of the right to a jury trial in the record. It is undisputed that a proper jury demand was asserted in appellee's answer filed on September 4, 2008, as "JURY DEMAND ENDORSED HEREON" was contained in its caption. Once a party makes a proper jury demand, the demand applies to the entire action and all parties, regardless of which party made the demand, and can be waived only as provided by Civ.R. 39(A). *Jovanovski v. Kotefski*, 9th Dist. No. 07CA009203, 2008-Ohio-4773, ¶14. Civ.R. 39(A) states:

When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist. The failure of a party or his attorney of record either to answer or appear for trial constitutes a waiver of trial by jury by such party and authorizes submission of all issues to the court.

{¶6} Appellant contends none of the requirements of Civ.R. 39(A) have been satisfied; thus, the jury demand remained in effect. In response, appellee argues that because appellant failed to provide this court with a transcript of the proceedings as required by App.R. 9(B), we must presume regularity in the proceedings in the trial court and overrule this assigned error. Appellee also states, "the issue of whether to try the case to a jury was discussed between both counsel and the court, and it was determined

that a jury trial was not desired by either party." (Appellee's brief at 7.) We, however, find two flaws in appellee's argument.

{¶7} First, we note that we have allowed appellant to supplement the record with the first 20 pages of transcript, wherein the following colloquy took place immediately prior to trial:

[APPELLANT'S COUNSEL]: We didn't have the opportunity to get it filed due to the short time constraint to – I will provide it to counsel in enough time to get it in one of the counts, but we just – due to the time constraints, due to the fact we didn't realize it was set for court trial today rather than a jury trial, we are going to bring them in live.

THE COURT: All right. [Counsel], the notices for today's court proceedings issued back on April 10, 2009, notes that the case was scheduled for court trial. There had also been notice issued to the parties on March 13, 2009, that had set the case for court trial April 15, 2009. And I'm sure that there is an entry that I filed on April 9th or so of 2009 that cancelled the April 15 scheduled court trial date to give me the opportunity to rule on the outstanding motions. So at least from March 13 of 2009 through today's date, the Court file reflects that the parties were on notice that the trial was going to be a court trial.

(Tr. 4.)

{¶8} Aside from the above, there is no further discussion by any party regarding a jury, and after discussing other preliminary matters, the trial court proceeded to swear in the first witness. Thus, the record reflects the trial court concluded there would be a bench trial. However, this conclusion was not made in accordance with Civ.R. 39, and the record does not reflect this conclusion was made in accordance with the parties' consent to a waiver, and appellee does not suggest to the contrary. The trial court's statement that the trial would proceed to the court as previously ordered does not

constitute an explicit waiver of appellant's right to a jury trial. *Daylay Eierfarm GMBH & Co. v. Thompson* (May 1, 1986), 3d Dist. No. 8-84-21. Further, it has been held that a silent record means that a previously demanded right to a jury trial is still in effect and has not been waived. *Id.*, citing *Carl Sectional Home, Inc. v. Key Corp.* (1981), 1 Ohio App.3d 101. Additionally, the colloquy above does not constitute a finding by the trial court that a right of trial by jury does not exist, and no such finding appears elsewhere in the record.

{¶9} Secondly, as this court held in *Carl Sectional Home*, at 104:

Under Civ. R. 39(A), a silent record means that the previously demanded right to a jury trial is still in effect, not having been waived. Under the Civil Rules it is easy to clarify on the record the claimed waiver before trial. The burden is upon the party claiming a waiver to show compliance with the mandatory requirements of Civ. R. 39(A).

{¶10} A demand for a jury trial was asserted in appellee's answer. As set forth above, once a party makes a proper jury demand, the demand applies to the entire action, and all parties, regardless of which party made the demand, and can be waived only as provided by Civ.R. 39(A). *Jovanovski*, *supra*. The record here is not simply silent as to waiver but actually demonstrates the lack of an agreement to waive a jury. Further, the record does not contain a finding by the trial court that a right to a jury trial does not exist. As stated in *Carl Sectional Home*, the burden is upon the party claiming a waiver to show compliance with the mandatory requirements of Civ.R. 39(A), and appellee has not done so. Since none of Civ.R. 39(A)'s requirements were satisfied so as to negate the previously entered demand for a jury trial, the same was still in effect, and we have no choice but to find the trial court improperly denied appellant the right to a jury trial. See *Carl Sectional Home*. See also *Mickens v. Smith*, 6th Dist. No. E-05-078, 2006-Ohio-

4300 (failure to object at the hearing before a municipal court magistrate to proceeding without a jury did not constitute a waiver of a right to a jury trial); *Jovanovski*, supra (because the record contained no stipulation consenting to a bench trial after a proper jury demand was made by one of the parties, it was error for the trial court to proceed without a jury); *Bishop v. Hybrid Equip. Corp.* (1988), 42 Ohio App.3d 55 (a proper jury demand was made and the record did not demonstrate the waiver requirements of Civ.R. 39(A) had been satisfied therefore proceeding to a bench trial was in error); *Commonwealth Land Title Ins. Co. v. Davis* (Sept. 22, 1992), 10th Dist. No. 91AP-1239 (a silent record means a previously demanded jury trial is still in effect and the trial court did not err in conducting a jury trial). Accordingly, we sustain appellant's first assignment of error.

{¶11} Because the remaining assignments of error have been rendered moot by our disposition of appellant's first assigned error, they will not be addressed.

{¶12} For the foregoing reasons, appellant's first assignment of error is sustained, the remaining assignments of error are overruled as moot, the judgment of the Franklin County Municipal Court is reversed, and this matter is remanded to that court for further proceedings consistent with law and this decision.

*Motion to supplement record granted;
judgment reversed and cause remanded.*

BRYANT and BROWN, JJ., concur.
