[Cite as *Johnson v, Encompass Ins. Co. of Am.*, 2012-Ohio-59.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Stephen Johnson,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-935 (C.P.C. No. 09CVH-10-15983)
Encompass Insurance Company of America,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on January 10, 2012

Vincent DePascale, for appellant.

Lane, Alton & Horst, LLC, *Rick E. Marsh* and *Ray S. Pantle*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant, Stephen Johnson ("appellant"), appeals the judgment rendered by the Franklin County Court of Common Pleas in favor of defendant-appellee, Encompass Insurance Company of America ("Encompass"). For the reasons that follow, we reverse the judgment of the trial court.

{¶2} This matter concerns a dispute over insurance coverage. Appellant had automobile insurance coverage through a policy issued by Encompass. Included within the policy was a provision under which coverage could be cancelled due to the non-

payment of premiums as long as appellant was notified at least ten days before such a cancellation. Encompass provided the requisite cancellation notice and received no timely payment. As a result, the policy was cancelled at midnight on July 29, 2009.

{¶3} On August 17, 2009, appellant submitted a payment to Encompass for $1,124.50. Encompass accepted the payment and provided appellant with a receipt. Four days later, appellant was involved in a motor vehicle accident. A passenger from appellant's vehicle, Nan Barnebey, filed a claim with Encompass. On August 25, 2009, Encompass mailed a letter to Ms. Barnebey, who resided at appellant's same address. The letter requested certain information from Ms. Barnebey in order to obtain medical payment coverage under appellant's policy. Then, on September 2, 2009, Encompass notified appellant that his policy was not in effect on the date of the accident. On September 4, 2009, Encompass issued a refund to appellant in the amount of $965.50.

{¶4} Appellant initiated the instant declaratory judgment action in which he seeks a declaration that his automobile insurance policy was valid and in effect at the time of the accident. Encompass sought summary judgment which the trial court granted. Appellant then filed a motion for relief from judgment under Civ.R. 60(B). Before the trial court ruled on appellant's Civ.R. 60(B) motion, appellant appealed the decision granting summary judgment. This court issued a limited remand to provide the trial court with an opportunity to decide appellant's Civ.R. 60(B) motion. The trial court denied appellant's motion, which resulted in the matter returning to this court. In this appeal, appellant presents the following assignments of error:

> I. THE TRIAL COURT ERRED IN WEIGHING EVDIENCE IN RULING ON A MOTION FOR SUMMARY JUDGMENT.

> II. THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF'S O[HIO] CIV[.] R[.] 60 MOTION WHEN THE DECISION ON THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WAS GRANTED UPON IMPROPER GROUNDS.

{¶5} In his first assignment of error, appellant argues that summary judgment was improperly granted in Encompass's favor. At issue, therefore, is whether the trial court erred in granting summary judgment.

{¶6} An appellate court's review of summary judgment is de novo. *Helton v. Scioto Cty. Bd. Of Commrs*. (1997), 123 Ohio App.3d 158, 162. Under such a review, an appellate court stands in the shoes of the trial court and conducts an independent review of the record. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. The judgment must be affirmed if any of the grounds raised by the movant support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶7} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd*., 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶8} In this appeal, appellant concedes that his policy was properly cancelled. Encompass mailed a cancellation notice and no timely payment followed. Therefore, the issue is only whether appellant's policy was reinstated. He argues that genuine issues of

material fact exist in this regard. In support, appellant cites portions of the receipt Encompass issued to him upon its acceptance of the $1,124.50 premium payment. In their entirety, the "Conditions of Receipt" provide:

> 1) Any policy which has been cancelled, our acceptance of this payment does not (a) reinstate the policy, or (b) afford coverage for any accident, occurrence, or loss which took place before this receipt was issued. A refund will be provided if coverage is not reinstated. Notification will be provided if the coverage is reinstated.
> 2) If we mailed a cancellation notice or notice of termination and your check or other remittance is not honored upon presentation, your policy terminates on the date and time shown on the cancellation notice or the notice of termination and this receipt is of no effect. This means we will not be liable for claims or damages after the date and time indicated on the cancellation notice or notice of termination.

Appellant notes that Encompass accepted the payment, which was honored by his financial institution. He also notes that Ms. Barnebey received a letter indicating that she was covered under the policy. Further, even after Encompass denied coverage, it only issued a partial refund of his premium. Finally, he argues that Encompass's notice refusing reinstatement was untimely. Based upon these circumstances, appellant argues that there are genuine issues of material fact as to whether the policy was reinstated. After reviewing the record and construing the evidence in appellant's favor, we agree.

{¶9} Again, our concern regards reinstatement rather than cancellation. Two elements are required in order to show that an insurance policy was reinstated based upon the acceptance of an untimely premium. *Schwer v. Benefit Assn. of Ry. Employees, Inc.* (1950), 153 Ohio St. 312, 323 (citations omitted). Clearly, the premium must be accepted. But the acceptance of the premium must accompany an insurer's

assent to reinstate the insured's policy. Id. Indeed, a meeting of the minds is necessary on this issue. Id.

> The concepts of "mutual assent" and a "meeting of the minds" are related. See, e.g., *DeHoff* [*v. Veterinary Hosp. Operations of Cent. Ohio, Inc.*, 10th Dist. No. 02AP-454, 2003-Ohio-3334,] ¶47, citing *Renaissance Technologies, Inc. v. Speaker Components, Inc.*, 9th Dist. No. 21183, 2003-Ohio-98, ¶15 (stating that for a contract to exist, there must be mutual assent or a meeting of the minds as to the offer and acceptance). Manifestation of mutual assent requires that each party make a promise or begin to render performance. *Precision Concepts Corp. v. Gen. Emp. & Triad Personnel Servs., Inc.* (July 25, 2000), 10th Dist. No. 00AP-43, 2000 Ohio App. LEXIS 3322, [2000 WL 1015114], citing *McSweeney v. Jackson* (1996), 117 Ohio App.3d 623, 631. The 'manifestation of assent may be made wholly or partly by written or spoken words, or by other acts or the failure to act.' *Precision Concepts Corp*.
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> Whether there has been a manifestation of mutual assent and/or a meeting of the minds is a question of fact to be determined from all the relevant facts and circumstances. See *Matusoff & Assoc. v. Kuhlman* (Sept. 28, 1999), 10th Dist. No. 98AP-1405, 1999 Ohio App. LEXIS 4510, [2000 WL 192449][.] * * *

Costner Consulting Co. v. US Bancorp, 10th Dist. No. 10AP-947, 2011-Ohio-3822, ¶14-15.

{¶10} The instant matter is factually similar to *Wygant v. Continental Ins. Agency* (Jan. 22, 1999), 1st Dist. No. C-980012. In that case, an insurance policy was cancelled due to non-payment of the premiums. The formerly insured ("Wygant") submitted a payment to the former insurer ("CNA") 13 days after the policy had been cancelled. CNA accepted the payment. However, according to CNA, a refund check was then mailed to Wygant on October 29, 1996. Wygant denied ever having received this refund check. Nevertheless, this check was not for the entire amount of Wygant's premium because

CNA had retained a portion thereof. Weeks later, Wygant was involved in an automobile accident. Months after the accident, CNA denied coverage and sent another partial refund check to Wygant. When presented with these circumstances, the First Appellate District held that summary judgment was improperly granted in favor of the insurer.

{¶11} Based upon the facts and circumstances presented herein, we must reach the same conclusion. As is clear, Encompass accepted appellant's premium, which was honored by his financial institution. Consequently, the relevant analysis concerns the first provision of the receipt provided to appellant on August 17, 2009. Based upon that provision, Encompass had two options after it accepted appellant's premium. It could either reinstate the policy or not. Encompass's choice would result in appellant either receiving "a refund" or a "notification." That is, appellant would receive "a refund" if his policy was not reinstated, while he would receive a "notification" if it was. Nowhere are these terms further defined in the record before us.

{¶12} Encompass chose to issue a partial refund. Indeed, it retained $159 of appellant's $1,124.50 premium and simply stated that it was entitled to retain this amount. However, no authenticated evidence supports this purported entitlement. More significantly, however, consideration must also be given to the letter Encompass mailed to Ms. Barnebey on August 25, 2009. For the reasons outlined in the concurring opinion, this letter plainly indicated that coverage existed on the date of the accident. Finally, it was not until September 2, 2009 when Encompass notified appellant that his policy had not been reinstated on August 17, 2009. All of this evidence relates to the manifestation of Encompass's assent. When construing the evidence in appellant's favor, as we must, we find that genuine issues of material fact exist in the record before us. Again, questions

pertaining to the manifestation of assent and the meeting of the minds generally present issues of fact. *Costner* at ¶15, citing *Matusoff & Assoc. v. Kuhlman* (Sept. 28, 1999), 10th Dist. No. 98AP-1405.

{¶13} Based upon the foregoing, we sustain appellant's first assignment of error, which renders moot his second assignment of error. We accordingly reverse the judgment rendered by the Franklin County Court of Common Pleas and remand this matter for further proceedings consistent with this decision and in accordance with law.

Judgment reversed;
cause remanded.

DORRIAN, J., concurs.
SADLER, J., concurs separately.

SADLER, J., concurring separately.

{¶14} I agree with the majority that this matter must be remanded to the trial court because the existence of a genuine issue of material fact precludes summary judgment. However, because I do so on the sole basis that the record contains contradictory evidence regarding whether Encompass assented to reinstatement of appellant's policy, I concur separately.

{¶15} On August 25, 2009, after accepting appellant's payment and after the date of loss, Encompass issued a letter to the injured passenger from appellant's vehicle requesting information from the passenger to investigate the claim. Importantly, the letter expressly references policy number 503386885, which is the same as that listed on the prior renewal notice, and expressly states that the policy term is "07/30/09-07/30/10." Though this appears to indicate Encompass assented to reinstatement, on September 2, 2009, Encompass issued a partial refund and notified appellant that his policy was not in

effect on August 17, 2009, based on its decision to deny reinstatement. Construing this evidence in appellant's favor, a genuine issue of material fact is apparent as to whether Encompass assented to the reinstatement of appellant's policy.

{¶16} Therefore, I concur with the majority's conclusion that the trial court's judgment must be reversed and this matter remanded for further proceedings.