[Cite as *Palmer v. Grange Mut. Cas. Co.*, 2009-Ohio-3939.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

DANIEL PALMER,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2008-T-0124**
- vs -	:	
GRANGE MUTUAL CASUALTY CO.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2007 CV 125.

Judgment: Affirmed.

Angela J. Mikulka and *Thomas L. Mikulka*, The Mikulka Law Firm, L.L.C., 134 Westchester Drive, Youngstown, OH 44515 (For Plaintiff-Appellant).

Robert H. Eddy, Gallagher, Sharp, Fulton & Norman, 420 Madison Avenue, #1250, Toledo, OH 43604, *Timothy J. Fitzgerald* and *Holly Olarczuk-Smith*, Gallagher, Sharp, Fulton & Norman, Sixth Floor, Bulkley Building, 1501 Euclid Avenue, Cleveland, OH 44115-2108 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Daniel Palmer, appeals the judgment of the Trumbull County Court of Common Pleas, granting summary judgment in favor of defendant-appellee, Grange Mutual Casualty Company. For the following reasons, we affirm the decision of the court below.

{¶2} On July 6, 1995, Palmer was injured in a motor vehicle accident caused by the negligence of Eric L. Cerny, who was insured under a policy issued by State Farm Mutual Automobile Insurance Company. Palmer was insured by Grange through an automobile insurance policy, which included Medical Payments Coverage. Grange made medical payments on Palmer's behalf. Grange acquired a subrogated interest in any recovery obtained against Cerny, pursuant to the following provision in the insurance policy with Palmer:

> **{¶3}** Our Right To Recover Payment
>
> **{¶4}** A. If we [Grange] make payment under this policy and the person to or for whom payment was made has a right to recover damages from another, we shall be subrogated to that right. That person [Palmer] shall do:
>
> **{¶5}** 1. Whatever is necessary to enable us to exercise our rights; and
>
> **{¶6}** 2. Nothing after loss to prejudice them.
>
> **{¶7}** B. If we make payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall:
>
> **{¶8}** 1. Hold in trust for us the proceeds of the recovery; and
>
> **{¶9}** 2. Reimburse us to the extent of our payment.

{¶10} As of February 19, 1996, Grange had paid $8,343.77 to various medical providers for medical treatment received by Palmer for lumbar disc herniations and thoracic compression fractures. According to the deposition testimony of Palmer's primary care physician, Gary Stucke, M.D., these injuries were directly related to the July 6, 1995 accident.

{¶11} On February 21, 1997, Grange filed a claim against State Farm with Arbitration Forums, Inc. Pursuant to the terms of an inter-company arbitration

agreement between Grange and State Farm, "[s]ignatories are bound to forego litigation and submit to arbitration any questions or disputes which may arise in the pursuit and disposition of medical payment subrogation claims ***."

{¶12} Grange notified counsel for Palmer, by letter, of its interest in any settlement ultimately reached with the tortfeasor based on the payments made for medical expenses: "Upon settlement of this case, we will look to recover 100% of our interest. This is in accordance with our Personal Auto Policy, and under the provision entitled Our Right To Recover Payment. Be advised that our interest in this case has been protected by our filing for a hearing through the Arbitration Forums, Inc."

{¶13} On June 20, 1997, Palmer filed suit against Cerny. In the course of this litigation, Cerny raised the defense that Palmer's compression fractures were not proximately caused by the accident. Based on a negative bone scan performed eleven days after the accident, a defense expert opined, "to a reasonable degree of medical certainty, that the automobile accident of 7/6/95 did not result in any type of spinal fracture whatsoever."

{¶14} On September 17, 2002, Palmer's counsel sent Grange a copy of the report of Cerny's defense expert and advised that the current settlement offer "does not include the expenses associated with the hospitalization or treatment for compression fractures." The letter concluded as follows: "In light of the causation issues present in this case, Grange is requested to waive repayment of the medical payments coverage paid to Mr. Palmer."

{¶15} On November 22, 2002, Palmer filed a First Amended Complaint, adding Grange as a defendant on the grounds that it is "a real party in interest as to its

subrogated amounts." The Amended Complaint further alleged that "the subrogated provisions of the GRANGE policy are ambiguous, are contrary to public policy, and therefore, are void and unenforceable"; that "GRANGE breached its duty of good faith and fair dealing by its continued pursuit of its subrogation interests in light of subsequent [medical] information supplied to GRANGE"; and "that [Palmer] may be entitled to underinsured motorists coverage under [the] GRANGE policy in the event Defendant, CERNY is or becomes underinsured."

{¶16} On February 23, 2004, Palmer's claims against Cerny were "settled and dismissed with prejudice." According to Palmer's deposition testimony, the claims were settled for "maybe $39,000 or something."

{¶17} On March 10, 2004, Arbitration Forums awarded Grange $2,494.27 from State Farm for medical payments made on behalf of Palmer.

{¶18} On January 19, 2006, Palmer's claims against Grange were voluntarily dismissed without prejudice.

{¶19} On January 12, 2008, Palmer filed a Complaint for Breach of Contract and Bad Faith against Grange in the Trumbull County Court of Common Pleas. The new Complaint renewed the allegations that the subrogation provision in the Grange policy was unenforceable and that Grange committed the tort of bad faith by pursuing its subrogated interest in light of the evidence that Palmer's injuries were not proximately caused by Cerny. Additionally, Palmer raised breach of contract claims based on Grange's attempt "to recover subrogation amounts under its policy for injuries and damages to [Palmer] which were not recognized nor included in the settlement with

Cerny"; and Grange's participation in Palmer's lawsuit against Cerny where such participation was precluded by the terms of the "inter-company binding arbitration."

{¶20} On May 10, 2007, Grange filed an Answer to Complaint and Counterclaim for Declaratory Judgment, seeking a declaration that the "Med Pay subrogation clause in the Grange policy is valid, enforceable *** and not contrary to public policy."

{¶21} On June 17, 2008, Grange moved for summary judgment.

{¶22} On October 23, 2008, the trial court entered judgment in Grange's favor. The court declared that the subrogation clause in the Grange policy was valid and enforceable, citing *Smith v. Travelers Ins. Co.* (1977), 50 Ohio St.2d 43. The court held the bad faith claim "fails as a matter of law because [Grange's] position in deciding to stand on its contractual rights of subrogation is supported by the very contract of which [Palmer] agreed. *** This is not a case in which the Plaintiff asserts bad faith in the performance of the contract, but rather bad faith in refusing to waive rights provided by the contract itself."

{¶23} On November 18, 2008, Palmer filed his Notice of Appeal. On appeal, Palmer raises the following assignments of error:

{¶24} "[1.] The Trial Court erred in granting summary judgment to Grange because Palmer's Complaint set forth a valid cause of action for the tort of bad faith which could only be decided by a jury."

{¶25} "[2.] The Trial Court erred in granting summary judgment to Grange because the issue of whether Palmer was fully compensated so as to entitle Grange to full recovery of its subrogated interest was a jury question."

{¶26} "[3.] The Trial Court erred in granting summary judgment to Grange because its rights of subrogation were not absolute."

{¶27} "[4.] The Trial Court erred in granting summary judgment to Grange because the matter had been submitted to inter-company arbitration and Grange was contractually precluded from participating in any other forum for recovery of its interest."

{¶28} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "[t]he moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence *** that reasonable minds can 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 *** construed most strongly in the party's favor." A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336.

{¶29} "Based upon the relationship between an insurer and its insured, an insurer has the duty to act in good faith in the handling and payment of the claims of its insured. A breach of this duty will give rise to a cause of action in tort against the insurer." *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, at paragraph one of the syllabus; *Hart v. Republic Mut. Ins. Co.* (1949), 152 Ohio St. 185, at paragraph two of the syllabus. "An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994-Ohio-461, at paragraph one of the syllabus.

{¶30} "To withstand a motion for summary judgment in a bad faith claim, an insured must oppose such a motion with evidence which tends to show that the insurer had no reasonable justification for refusing the claim, and the insurer either had actual knowledge of that fact or intentionally failed to determine whether there was any reasonable justification for refusing the claim." *Tokles & Sons, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 630.

{¶31} In the first assignment of error, Palmer contends a triable issue of material fact exists as to whether Grange acted in good faith by "pursuing recovery amounts it knew or had reason to know that its insured was not recovering." We disagree.

{¶32} The undisputed facts of the present case demonstrate that Grange possessed a reasonable justification for seeking to recover the full amount of medical payments made on Palmer's behalf. As argued in Palmer's brief, he "was hospitalized by an orthopaedic surgeon for compression fractures and his primary care physician testified in deposition that [he] sustained compression fractures as a direct and proximate result of the collision." If Palmer was justified in claiming medical payments for the compression fractures, Grange was justified in seeking to recover for those payments.

{¶33} Nor is there any evidence of bad faith in Grange's pursuit of its subrogation claim. Pursuant to its arbitration agreement with State Farm, Grange submitted its claim to arbitration, and did so prior to Palmer's filing suit against the tortfeasor. In September 2002, Palmer notified Grange of the negative bone scan and requested the waiver of its subrogation rights relative to medical payments. Grange was under no obligation to waive its rights, which were currently the subject of

arbitration. Only two months later, however, Palmer filed suit against Grange for bad faith in refusing to concede its rights. Despite ongoing arbitration and involving Grange in the lawsuit against Cerny, Palmer was able to settle his claims against the tortfeasor. Grange was ultimately awarded $2,494.27 from State Farm.

{¶34} In his appellate brief, Palmer claims "it was bad faith for Grange to hold up settlement of [his] case, literally for years." Palmer fails to adduce any evidence, however, that Grange's refusal to waive its subrogation claim delayed settlement with Cerny. The record before this court demonstrates otherwise. Palmer settled his claims with Cerny less than two years after advising Grange of the causation issues with respect to the compression fractures and settled them independently of Grange's subrogated claims.

{¶35} Accordingly, Grange was entitled to judgment as a matter of law. Cf. *Vogias v. Ohio Farmers Ins. Co.* (11th Dist.), 177 Ohio App.3d 391, 2008-Ohio-3650, at ¶43 (summary judgment properly granted on bad faith claims where the insurer's conduct was "predicated upon circumstances that furnish reasonable justification").

{¶36} The first assignment of error is without merit.

{¶37} In the second assignment of error, Palmer argues Grange was unable to recover its subrogated interest unless he was fully compensated for his injuries. Since there was no evidence that Palmer was fully compensated, it was improper to grant summary judgment. Palmer relies on this court's decision in *Johnson v. Progressive Ins. Co.*, 11th Dist. No. 98-L-102, 1999 Ohio App. LEXIS 6258, for the proposition that the courts must "review whether or not the injured party has been fully compensated before granting the insurer's [subrogated] claim priority" to the proceeds of a settlement.

Id. at *15, citing *Blue Cross & Blue Shield Mut. of Ohio v. Hrenko*, 72 Ohio St.3d 120, 1995-Ohio-306, at syllabus.

{¶38} Palmer's argument fails because he failed to introduce any evidence into the record demonstrating that he was not fully compensated for his injuries prior to Grange recovering its subrogated interest from State Farm.

{¶39} Palmer's argument is premised on the "make whole" doctrine. In Ohio law, there is a "general rule of subrogation *** 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." *N. Buckeye Edn. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886, at ¶25, citing *James v. Michigan Mut. Ins. Co.* (1985), 18 Ohio St.3d 386, 388 (emphasis in original); *Hrenko*, 72 Ohio St.3d 120, at syllabus.

{¶40} This court has held that "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." *Hawkins v. Anchors*, 11th Dist. Nos. 2002-P-0098, 2002-P-0101, and 2002-P-0102, 2004-Ohio-3341, at ¶48, quoting *Erie Ins. Co. v. Kaltenbach* (1998), 130 Ohio App.3d 542, 547 (internal citation omitted); accord *Allen v. Binckett*, 5th Dist. No. CT2008-0027, 2009-Ohio-2969, at ¶28.

{¶41} In the present case, Palmer settled with Cerny for an amount less than the liability limits of the State Farm policy. Palmer also testified in deposition that the approximately $39,000 he received "was a full settlement" of his claims against Cerny.

Accordingly, Palmer has failed to raise a genuine, material issue as to whether he was fully compensated for his injuries by the settlement with Cerny.[1]

{¶42} The second assignment of error is without merit.

{¶43} In the third assignment of error, Palmer argues that Grange's "rights of subrogation were not absolute" and were "no greater" than his own right of recovery. Palmer maintains that, since State Farm denied his claim for the thoracic compression fractures, Grange's efforts to recover its subrogated interest for the same injuries amounts to bad faith.

{¶44} This argument fails for the reasons set forth above. Grange was under no obligation to waive its right to subrogation merely because State Farm contested the validity of the thoracic injuries. Grange's decision to pursue its subrogation rights was justified by the fact both Palmer and Dr. Stucke continued to maintain that these injuries were caused by Cerny's negligence. Palmer has failed to introduce any evidence that Grange's decision to pursue full reimbursement for its medical payments delayed or compromised the settlement of his claims with Cerny. In sum, the fact that State Farm disputed the validity of certain injuries does not render Grange's assertion of its subrogation rights, with respect to those injuries, an act of bad faith.

{¶45} The third assignment of error is without merit.

{¶46} In the fourth and final assignment of error, Palmer asserts Grange committed the tort of bad faith by participating in the underlying lawsuit against Cerny, thus violating the terms of the intercompany arbitration agreement with State Farm.

1. The record before this court is incomplete with respect to the terms of Palmer's settlement with Cerny/State Farm. Although Palmer settled and dismissed his claims against Cerny in February 2004, that settlement did not preclude Grange from subsequently receiving reimbursement for medical payments as determined in arbitration.

According to Palmer, Grange was precluded from attempting to recover its subrogated interest in any forum except arbitration. Palmer claims that he and the trial court were unaware of the submission of the claim to arbitration, which delayed the settlement of the claims against Cerny. We disagree.

{¶47} The evidence before this court demonstrates that Grange advised Palmer that its subrogated interest would be protected by its submission of the claim to arbitration in January 1997, five months before Palmer filed suit against Cerny. Moreover, Grange's participation in the suit against Cerny was solely the result of Palmer's decision to amend the Complaint to include Grange as a defendant. Grange's subrogated claim for medical payments was ultimately determined through arbitration, in accordance with the agreement with State Farm. Thus, Grange's involuntary participation in the underlying lawsuit is not evidence of bad faith.

{¶48} The fourth assignment of error is without merit.

{¶49} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas, granting summary judgment in favor of Grange Mutual Casualty Company, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.