[Cite as *Allstate Ins. Co. v. Cope*, 2004-Ohio-2603.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

ALLSTATE INSURANCE COMPANY	:	
Plaintiff-Appellee	:	C.A. Case No. 20179
v.	:	T.C. Case No. 03-CVE-6059
WILLIAM F. COPE, JR.	:	(Civil Appeal from Dayton Municipal Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 21st day of May, 2004.

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FAIN, P.J.

{¶1} Defendant-appellant William F. Cope, Jr., appeals from a judgment rendered against him on a complaint for damages filed by plaintiff-appellee Allstate Insurance Company (Allstate).

{¶2} Cope contends that he did not receive notice regarding Allstate's motion for judgment on the pleadings, and that it was therefore error for the trial

court to grant the motion. He further contends that the trial court was barred, by reason of his payment of restitution in a related criminal case, from awarding damages against him. Finally, he contends that Allstate did not present adequate evidence regarding the measure of its damages.

{¶3} We conclude that Cope was provided adequate notice of the pending motion for judgment on the pleadings. We further conclude that the trial court erred by rendering judgment against Cope, because his answer contained allegations that could potentially destroy Allstate's subrogation rights, thereby precluding judgment against Cope. Finally, we conclude that the remaining issues are rendered moot.

{¶4} Accordingly, the judgment of the trial court is reversed, and this cause is remanded for further proceedings.

I

{¶5} Allstate filed a subrogation complaint against Cope, seeking the sum of $4,200, which it had paid to or on behalf of its insured, Shirley Haverstock, for damages resulting from a fire that occurred at Haverstock's residence. Allstate alleged that the fire was caused by Cope, and that pursuant to its contract of insurance with Haverstock, it was entitled to seek damages against Cope.

{¶6} Cope filed an answer in which he did not deny starting the fire at Haverstock's residence. However, he alleged that he had been approached by the owner of the property and that he and the property owner had agreed that Cope would set fire to the property in exchange for two hundred dollars paid by the owner. According to Cope's answer, the owner had been ordered by the City of Dayton to make repairs to the property. Cope also alleged that the owner could not afford to

pay for the necessary repairs, and therefore contracted with Cope to set fire to the property.

{¶7} Allstate filed a motion for judgment on the pleadings, to which Cope did not respond. Thereafter, the trial court granted the motion, and rendered judgment in favor of Allstate and against Cope, in the amount of $4,200. From the judgment rendered against him, Cope appeals.

II

{¶8} Cope's First Assignment of Error is as follows:

{¶9} "THE TRIAL DATE FOR THE APPELLANT WAS SET FOR DECEMBER 16, 2003. AND I WAS TO BE THERE IN MY DEFENSE BUT THE COURT RULED ON IT ON SEPTEMBER 17, 2003. THE COURT TOLD ME THAT I HAD A RIGHT TO BE THERE. BUT WAS NOT ALLOWED CAUSED [SIC] THEY RULED UPON IT WITHOUT ANY NOTICE."

{¶10} Cope contends that the trial court erred in ruling upon Allstate's motion for judgment on the pleadings, because he was not provided appropriate notice.

{¶11} A review of the record reveals that Cope was appropriately served with the motion for judgment on the pleadings, and that he failed to respond. Therefore, we cannot say that the trial court erred in ruling on the motion. However, we conclude that the trial court erred in granting judgment to Allstate.

{¶12} Civ.R. 12(C) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "A Civ.R. 12(C) motion for judgment on the pleadings presents only questions of law." *Anderson v. Interface Electric, Inc.*, Franklin App. No. 03AP-354,

2003-Ohio-7031, ¶10, citation omitted. "In reviewing the trial court's decision to grant such a motion, this court conducts a de novo review of the legal issues without deference to the trial court's determination." Id., citation omitted. In deciding the motion, the court must construe all the allegations in the pleadings in favor of the non-moving party, and find that there is no set of facts that would necessitate the denial of the motion. Id.

{¶13} "Subrogation" is defined as "the substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies, or securities. * * * " Black's Law Dictionary (5th Ed. 1983) 743. In a subrogation claim, the subrogee stands in the shoes of the subrogor and is entitled to all the rights and remedies available to the subrogor, to the extent of the subrogee's interest. *Chemtrol Adhesives, Inc. v. Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, 42. A subrogated insurer has no greater rights than those of its insured. Id. "The legal doctrine of subrogation has long been recognized as an insurer's derivative right." *Bogan v. Progressive Cas. Ins. Co.* (1988), 36 Ohio St.3d 22, 29, overruled in part on other grounds *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, paragraph two of the syllabus.

{¶14} In this case, Cope alleged that he was paid, by the owner of the property, to set a fire and destroy the property. Therefore, the owner of the insured property is potentially liable for its destruction, and might have no right of recourse

against Cope.[1] Allstate's claim against Cope is derivative of its insured's claim, and may be barred by any possible wrongdoing on the part of its insured.

{¶15} Because when reviewing a determination of a judgment on the pleadings an appellate court is required to construe all material allegations in a pleading, along with all reasonable inferences drawn therefrom, in favor of the nonmoving party, we conclude that, based upon the pleadings, a reasonable inference arises that the owner of the insured property may have contracted with Cope for the destruction of the property. Therefore, the owner might have no right of recourse against Cope, and Allstate would have no right of subrogation. Accordingly, we conclude that the trial court erred in granting Allstate's motion for judgment on the pleadings. In reaching this conclusion, we are, of course, reaching no judgment with respect to Cope's credibility in making his allegations of arson for hire.

{¶16} The First Assignment of Error is sustained.

III

{¶17} Cope's Second and Third Assignments of Error are as follows:

{¶18} "IN THE PLEA AGREEMENT I WAS TO PAY RESTITUTION UPON MY RELEASE, BY THAT AGREEMENT THEY COULD NOT GET THE 10% ON

[1]We recognize that Allstate, in turn, might plead that the alleged contract between Cope and the owner of the property, being unenforceable, as against public policy and the law against arson (R.C. 2909.03), can furnish no defense to its subrogor's claim against Cope, but we regard it as premature, in the extreme, to decide whether one who hires another to commit arson against his property can have a claim in tort against that other for carrying out the criminal scheme. Allstate has never pled this theory of avoidance of the agreement alleged by Cope to have been made between him and the owner of the property, and we take no position regarding its validity. Likewise, Allstate has never pled a theory of recovery against Cope for the direct tort of fraud in connection with an insurance claim.

THE JUDGMENT OF THE COURT.

{¶19} "THE INSURANCE CO. SENT THE APPELLANT TWO STATEMENTS. FIRST ONE ON 3, 2, 2002 IT WAS FOR $4,300.00 DOLLARS. I WROTE THEM A LETTER ASKING FOR PROFF [SIC] OF DAMAGE WITH PICTURES AND INVOICE OF MATERIAL AND LABOR COST, BUT THEY DID NOT DO THAT. THEN THEY SUE FOR THAN THE AMOUNT AND ASK FOR IN THE FIRST STATEMENT. WHAT IS THE TRUE COST OF SAID DAMAGE? FOR THE COURT TO EVEN RULE AND ORDER THE APPELLANT TO PAY 10% IS A CLEAR VIOLATION OF HIS PLEA AGREEMENT."

{¶20} Cope contends that the trial court erred by awarding judgment to Allstate. He bases this upon his argument that he agreed to pay restitution pursuant to his plea agreement in the ancillary criminal case, and that he thus, cannot be required to make payment by civil judgment. He also argues that Allstate failed to prove the amount of its damages.

{¶21} These arguments have been rendered moot by our disposition of the First Assignment of Error, set forth in Part II, above, and Cope's Second and Third Assignments of Error are therefore overruled. We do note, however, that the measure of the damages to which Allstate alleges to have been subrogated would be the difference in the value of the property before and after the fire, which, not being a liquidated amount, would ordinarily necessitate a damages hearing unless the amount of the damages were expressly admitted or conceded.

IV

{¶22} Cope's First Assignment of Error having been sustained, and his other

assignments of error having been overruled as moot, the judgment of the trial court is reversed, and this cause is remanded for further proceedings.

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BROGAN and YOUNG, JJ., concur.

Copies mailed to:

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Hon. Daniel G. Gehres