[Cite as *Gerken v. State Auto Ins. Co. of Ohio*, 2014-Ohio-4428.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

LORI GERKEN,	:	Case No. 13CA14
	:	
Plaintiff-Appellant,	:	
	:	DECISION AND
v.	:	JUDGMENT ENTRY
	:	
STATE AUTO INSURANCE COMPANY OF OHIO,	:	
	:	**RELEASED: 9/8/2014**
Defendant-Appellee.	:	

APPEARANCES:

Patrick E. McFarland, Patrick E. McFarland, P.L.L.C., Parkersburg, West Virginia, for appellant.

Kurt D. Meyer, Gregory and Meyer, P.C., Troy, Michigan, for appellee.

Harsha, J.

{¶1} In this dispute over coverage under a homeowner's policy, Lori Gerken appeals the trial court's grant of summary judgment to State Auto Insurance Company (State Auto). Gerken argues that the trial court abused its discretion by granting State Auto's motion to deem its requests for admission admitted based on her failure to timely respond. Specifically, she challenges the trial court's finding that her responses were due August 25, 2011. However, she admits receiving State Auto's email that stated it would grant her a 30-day extension until August 25, 2011. Under Civ.R. 36(A) a party's requests for admissions are automatically deemed admitted if not timely responded to. Therefore, we reject Gerken's argument that the trial court abused its discretion by deeming State Auto's requests for admission admitted.

{¶2} Next Gerken argues that the trial court abused its discretion by not permitting her to withdraw or amend her deemed admissions. Citing Civ.R. 36(B) Gerken claims the trial court erred because the deemed admissions prevented presentation of the issues on their merits, and State Auto would not have been prejudiced by allowing the amendment. However, even if those assertions are true, the trial court still retains discretion to decide whether to grant the motion. Here Gerken's counsel cited only a misunderstanding of the due date and a "lack of attention" for multiple failures to comply with discovery deadlines. Thus, the trial court's decision to deny the motion to withdraw the admissions was reasonable.

{¶3} Finally Gerken contends that the trial court erred by granting State Auto's motion for summary judgment. On her breach of contract claim she argues that under the insurance policy's Loss Settlement provision, State Auto should have paid her the policy limit of $126,000 for damage to her home, rather than the actual cash value of the damage. Nevertheless, Gerken's deemed admissions conclusively established that under the Loss Settlement provision she was only entitled to recover the actual cash value of the building's repair or replacement. And because the policy's general language also supports this conclusion, we reject her argument.

{¶4} On her bad faith claim Gerken contends that State Auto acted without reasonable justification by taking eight months to pay her personal property claim. She bases her argument, in part, on the fact that State Auto returned her completed forms "several times" due to the adjuster's errors. However, State Auto acted reasonably by returning the forms and requesting additional information; each time it identified a

reasonable justification for its actions. Thus, we reject Gerken's argument that the trial court erred as a matter of law by granting State Auto summary judgment.

I. FACTS

{¶5} Following a fire in her vacation home, Gerken originally filed this action against State Auto in October 2009. She voluntarily dismissed the case in 2010 but then refiled the matter in June 2011 for declaratory judgment, breach of contract, and bad faith. On July 13, 2011, State Auto mailed a paper copy of its First Set of Combined Discovery Requests, which included requests for admissions, interrogatories and document requests, to Gerken's counsel. The discovery request stated "[p]ursuant to Rule 33 and Rule 34 of the Ohio Rules of Civil Procedure, [Gerken] is requested to produce answers to the following Request for Admissions * * * within 28 days of service hereof, on August 10, 2011 by 4:00 p.m." (Emphasis sic.)

{¶6} In a letter dated July 22, 2011, Gerken confirmed the receipt of State Auto's discovery requests and asked for a 30-day extension to answer. She also requested that State Auto serve her with an electronic copy of its discovery request pursuant to the Ohio Rules of Civil Procedure. On July 25, 2011, State Auto sent Gerken an email that included a copy of the discovery requests in electronic format. The email also agreed to a 30-day extension and specified that her "[a]nswers are now due on or before August 25, 2011." However, Gerken did not respond to State Auto's discovery requests until September 16, 2011.

{¶7} Meanwhile, on September 12, 2011, State Auto filed a motion to compel and to have its requests for admissions deemed admitted. In the motion State Auto recounted that it had agreed with Gerken via email to a 30-day extension until August

25, 2011. Attached to the motion were copies of Gerken's July 22, 2011 letter and State Auto's July 25, 2011 email. Two weeks later on September 27, 2011, Gerken filed a response to State Auto's motion asserting that she had now complied with all of State Auto's discovery requests and also provided it with a compact disc of approximately 1,000 documents. State Auto filed a reply in support of its motion and pointed out to the court that Gerken "offer[ed] no excuse for the late filed responses" and again requested that the court deem its requests for admission admitted. It also noted several other deficiencies with Gerken's responses and asked the court to compel her responses.

{¶8} After a non-oral hearing on State Auto's motion the court issued its decision finding that Gerken's responses to State Auto's discovery requests were due August 25, 2011, and that her "responses were filed late and no excuse was offered." However, considering that State Auto's discovery requests were "extensive," the court found that the appropriate remedy was for Gerken "to take note of all of the deficiencies in the Plaintiff's Reply of October 3, 2011, and immediately cure them;"[1] the court ordered Gerken to "fully respond" by November 30, 2011. The court also stated that "[a] further oral hearing will be held * * * on December 16th at 1:00 p.m. If compliance is not complete this Court will incorporate appropriate sanctions."

{¶9} On December 12, 2011, State Auto filed a supplemental brief in "Support of its Motion to Have Request to Admit Deemed Admitted and to Compel Responses to Interrogatories and Request for Production of Documents" and asserted that Gerken had failed to comply with the court's October 26, 2011 order and to supplement her

[1] It seems the trial court erroneously referred to the State Auto's October 3, 2011 reply as the "Plainiff's reply."

discovery responses. State Auto requested that the court sanction Gerken by dismissing her complaint or in the alternative deem its requests for admissions admitted. On December 16, 2011, Gerken filed supplemental responses to State Auto's request for discovery.

{¶10} At the December 16, 2011 hearing Gerken's counsel admitted that his failure to timely file the supplemental responses previously ordered by the court was due to "lack of attention, lack of care." Gerken's counsel also asserted for the first time that he misunderstood the 30-day extension agreed to by State Auto and complained of its failure to provide him of its discovery requests in electronic format. The trial court rejected Gerken's arguments, orally granted the motion and ordered State Auto's requests for admissions deemed admitted.

{¶11} The trial court then issued an entry on January 4, 2012, granting State Auto's motion and ordered "all matters in Requests for Admission 1-32 are deemed admitted for the reasons stated on the record." Over a month later on February 8, 2012, Gerken filed a motion under Civ.R. 36(B) to withdraw or amend the admissions that the trial court deemed admitted in its January 4, 2012 order. She requested that the court treat the answers she submitted on September 16, 2011, as amended admissions and claimed the court should grant her request due to State Auto's failure to properly serve her with an electronic copy of its discovery requests. In her motion, Gerken again asserted she misunderstood the 30-day extension granted by State Auto and believed that her response was due September 21, 2011. She further argued that even if the court considered her responses late, it was not an egregious situation where she was trying to avoid her discovery obligations.

{¶12} At an oral hearing on the motion Gerken's counsel admitted he "had a mistaken impression of when the admissions were due." The trial court found that this was not a "compelling reason" to grant her motion and affirmed its January 4, 2012 ruling. On April 25, 2012, the trial court issued an entry denying Gerken's motion to withdraw or amend her admissions "for the reasons stated on the record."

{¶13} After State Auto filed a motion for summary judgment, the trial court found that no genuine issue of fact remained and State Auto was entitled to judgment as a matter of law based on the facts established by Gerken's deemed admissions. This appeal followed.

II. ASSIGNMENTS OF ERROR

{¶14} Gerken raises two assignments of error for our review:

> 1. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DEEMING ADMITTED CERTAIN REQUEST FOR ADMISSION, AND THEREAFTER FAILING TO GRANT PLAINTIFF/APPELLANT'S MOTION TO WITHDRAW OR AMEND ADMISSIONS PURSUANT TO CIVIL RULE 36(B).
>
> 2. THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT AGAINST PLAINTIFF-APPELLANT.

III. LAW AND ANALYSIS

A. Requests for Admission

{¶15} First Gerken argues that the trial court erred by: 1.) ordering State Auto's requests for admissions admitted under Civ.R. 36; and 2.) denying her motion to withdraw or amend the admissions under Civ.R. 36(B).

1. Standard of Review

{¶16} "A trial court maintains broad discretion in regulating the discovery process. * * * Accordingly, the standard of review on a trial court's decision in a

discovery matter is whether the court abused its discretion. * * * A trial court abuses its discretion if its decision is unreasonable, arbitrary, or unconscionable." *Fifth Third Mtge. Co. v. Perry*, 4th Dist. Pickaway No. 12CA13, 2013-Ohio-3308, ¶ 69.

2. Were Gerken's Responses Timely Filed?

{¶17} Civ.R. 36 governs requests for admissions. Under Civ.R. 36(A) as it existed at the time,[2]

> A party serving a request for admission shall provide the party served with both a printed and an electronic copy of the request for admission. * * * A party who is unable to provide an electronic copy of a request for admission may seek leave of court to be relieved of this requirement. * * *
>
> (1) * * * The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service of a printed copy of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. Failure to provide an electronic copy does not alter the designated period for response, but shall constitute good cause for the court to order the period enlarged if request therefor is made pursuant to Rule 6(B) before the expiration of the designated period.

{¶18} Thus Civ.R. 36(A) is "self-executing" and the matters set forth in the requests for admissions are automatically deemed admitted if they are not answered by the rule's deadline. *Bronski v. Rite Aid Corp*., 4th Dist. Washington No. 88CA21, 1989 WL 11910, *2 (Feb. 16, 1989). *See also Sylvester Summers, Jr. Co., L.P.A. v. E. Cleveland*, 8th Dist. Cuyahoga No. 98227, 2013-Ohio-1339, ¶ 15. Unlike other discovery matters, the admission is made automatically and a motion seeking confirmation of those admissions is unnecessary. *Bronski* at *2. *See also National Mut. Ins. Co. v. McJunkin*, 8th Dist. Cuyahoga No. 58458, 1990 WL 56548, *2 (May 3, 1990)

[2] Civ.R. 36(A) was amended July 1, 2012.

(finding motion to deem matters admitted "superfluous"). "[T]he trial court has no discretion whether to deem the matters admitted." *Sylvester Summers* at ¶ 15.

{¶19} Gerken argues that her responses to State Auto's requests for admission were due on September 22, 2011, and she timely filed her responses on September 16, 2011. She contends that the trial court erred by finding that her responses were due on August 25, 2011, because she "always intended and believed that the 30 day extension" granted by State Auto "applied to extend the due date of [her] responses 30 days beyond when the answers * * * would otherwise be due."

{¶20} Regardless of Gerken's intention or understanding, State Auto explicitly stated in its email that it would agree to her request for a 30-day extension and her responses were due August 25, 2011, i.e. 30 days from their agreement to the extension. Gerken made no attempt to clarify her position after State Auto's email, and in fact never raised any issue with the deadline for response until the trial court's hearing on December 16, 2011, when she asserted for the first time that she misunderstood State Auto's extension. As the trial court stated in its October 26, 2011 order Gerken offered "no excuse" in her response to State Auto's motion regarding why her responses to the requests for admissions were late. Thus, the trial court did not abuse its discretion by finding her responses were due August 25, 2011, pursuant to the parties' agreement.

{¶21} Moreover, even accepting Gerken's argument that she believed State Auto's extension applied to 30 days past the original deadline, her responses were still late. Although Gerken calculates her response due date based on the date she received State Auto's electronic copy of the requests for admissions, Civ.R. 36(A)

clearly stated at the time that a party's "[f]ailure to provide an electronic copy does not alter the designated period for response." And the Staff Note to the July 1, 2009 Amendment of Civ.R. 36 confirms that "a responding party served with a printed copy of a request for admissions cannot rely on the failure to receive an electronic copy as reason to do nothing and simply disregard the response time." Although State Auto's failure to provide Gerken with an electronic copy of the requests for admissions would have been a basis to seek an enlarged period of time to respond under Civ.R. 6(B), she never petitioned the court with such a request. Thus, State Auto's failure to initially provide Gerken with a copy of its requests for admissions in electronic form had no effect on her 28-day deadline for response. *See Lecso v. Heaton*, 8th Dist. Cuyahoga No. 94121, 2010-Ohio-3880, ¶ 30, fn. 1 (party's remedy for improper service of requests for admission is to petition court, not ignore Civ.R. 36's requirements).

{¶22} Accordingly, assuming Gerken had an additional three days under former Civ.R. 6(E) [3] to respond because State Auto served her with its discovery requests by mail, the 31st day fell on a Sunday and her responses were due on the next business day, August 15, 2011. *See Portfolio Recovery Assoc., L.L.C. v. Dahlin*, 5th Dist. Knox No. 10-CA-000020, 2011-Ohio-4436, ¶ 25 (under Civ.R. 6(E) "appellants' responses to the Requests for Admission were due within 31 days of the date appellee mailed them"); *Lecso* at ¶ 28 (finding because the requests for admission were sent by mail "under Civ.R. 6(E), an additional three days is added to the 28-day deadline" and because the 31st day fell on a Sunday requests were due on the next business day); *Abuhilwa v. Corrections Medical Center*, 10th Dist. Franklin No. 08AP-642, 2008-Ohio-6915, ¶ 3

[3] Former Civ.R. 6(E), was amended on July 1, 2012, and is now Civ.R. 6(D).

(finding Civ.R. 6(E) afforded additional three days to respond to requests for admission); *Amer, Cunningham, Brennan, Co., L.P.A. v. Sheeler*, 9th Dist. Summit No. 19O93, 1999 WL 247110, *2 (Apr. 28, 1999) (finding because service was made by mail, under Civ.R. 6(E) party had an additional three days to respond to requests for admissions). Thus, even if we accept Gerken's argument that State Auto's extension applied to 30 days beyond the ordinary response date of August 15, 2011, and assume all extra time reasonable under the Ohio Civil Rules of Procedure, her responses were due on September 14, 2011. Because Gerken filed her responses late on September 16, 2011, under Civ.R. 36(A) the matters set forth in State Auto's requests for admission were automatically deemed admitted and at that point the trial court had recognized them establishing "the facts." *See Cleveland Trust Co.*, 20 Ohio St.3d at 67, 485 N.E.2d 1052 (when party failed to timely answer requests for admissions, "the admissions became facts of record which the court must recognize"). Thus, we conclude that the trial court did not err by ordering State Auto's requests for admissions admitted under Civ.R. 36.

3. Did the Trial Court Err in Denying Gerken's Motion to Amend/Withdraw?

{¶23} Once an admission by default arises under Civ.R. 36(A), the matter is conclusively established unless the trial court permits the party to amend or withdraw the admission upon motion. Civ.R. 36(B); *Cleveland Trust Co.* at 67; *Auto Owners Ins., v. Foxfire Golf Club, Inc.*, 4th Dist. Pickaway No. 05CA37, 2007-Ohio-1101, ¶ 9. "A request for admission can be used to establish a fact, even if it goes to the heart of the case. This is in accord with the purpose of the request to admit-to resolve potentially disputed issues and thus expedite the trial." *Id.* "The trial court 'has a greater ability to assess the parties' ability and willingness to cooperate in discovery, and hence has

broad discretion in controlling the conduct of discovery and in issuing sanctions for violations.'" *Garrick v. Greater Cleveland Reg. Trans. Auth.*, 8th Dist. Cuyahoga No. 99547, 2013-Ohio-5029, ¶ 14, quoting *Cheek v. Granger*, 8th Dist. Cuyahoga No. 78805, 2001 WL 1398454 (Nov. 1, 2001). Thus, we will only reverse a trial court's decision on a motion pursuant to Civ.R. 36 if we find the trial court abused it[s] discretion." *Tabor v. Westfield Cos.*, 4th Dist. Gallia No. 97CA05, 1998 WL 90899, *2 (Feb. 27, 1998), citing *Cleveland Trust Co.*

{¶24} Civ.R. 36(B) states:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Civ. R. 16 governing modification of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining his action or defense on the merits.

The two-part test established in Civ.R. 36(B) "emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice." *Cleveland Trust Co.* at 67.

{¶25} Gerken focuses her argument on whether she met the requirements of Civ.R. 36(B) and claims the trial court erred because the deemed admissions prevented presentation of the issues on their merits. She also contends State Auto would not have been prejudiced by allowing her to amend the deemed admissions. However, considering the facts of this case, we cannot say the trial court abused its discretion by denying Gerken's motion to withdraw or amend her admissions.

{¶26} We look first at the structural analysis used by the court, i.e. whether "compelling circumstances" are required to withdraw deemed admissions. Relying on *Cleveland Trust Co.*, State Auto argues that "Gerken must first prove compelling circumstances allowing the withdrawal or amendment of the admissions before the court gets to the questions of whether withdrawal or amendment will aid in the presentation of the merits of the case[.]"

{¶27} Here the court indicated that Gerken's mistaken belief of when the admissions were due was not "a compelling reason." In *Cleveland Trust Co.*, the Supreme Court stated:

> Civ.R. 36 requires that when requests for admissions are filed by a party, the opposing party must timely respond either by objection or answer. Failure to respond at all to the requests will result in the requests becoming admissions. *Under compelling circumstances, the court may allow untimely replies to avoid the admissions.* (Emphasis added).

Cleveland Trust Co., 20 Ohio St.3d at 67, 485 N.E.2d 1052. Based on this language, several appellate courts have determined that the movant must demonstrate compelling circumstances to withdraw her admissions. *See Crespo v. Harvey*, 2014-Ohio-1755, 11 N.E.3d 1206, ¶ 20 (2nd Dist.), and cases cited therein.

{¶28} The Second District Court of Appeals recently considered this issue and found that "while Civ.R. 36(B) does not require a movant to demonstrate compelling circumstances for failing to timely respond to a request for admissions, the trial court may still consider whether there is a justifiable excuse for the failure, as well as any other pertinent facts, when considering the culpability of the party that failed to respond." *Cotrill v. Noah's Transp. LLC*, 2nd Dist. Miami No. 2014-CA-2, 2014-Ohio-2098, ¶ 10. The court noted that the Supreme Court's decision in *Cleveland Trust Co.*

"was based on prejudice the appellee would endure" and thus the Court's analysis "suggests that the passage should be treated as dicta." *Crespo* at ¶ 18. Moreover the Second District pointed out there is no textual basis in Civ.R. 36(B) for requiring the movant to provide compelling circumstances before withdrawing his deemed admissions and this "should in itself suggest a new approach to the issue." *Id.* at ¶ 16.

{¶29} We agree with the Second District's conclusion that Civ.R. 36(B) and *Cleveland Trust Co.* do not make "compelling circumstances" a separate element of the analysis for deciding a motion to withdraw or amend deemed admissions. However, like *Cotrill* and *Crespo* we conclude a trial court may consider the party's justification for failing to timely respond to the requests for admissions when ruling on the motion. This is consistent with our position that reason for the delay is a factor to be considered by the trial court in exercising its discretion. *See Bronski*, 4th Dist. Washington No. 88CA21, 1989 WL 11910, at *3 (Feb. 16, 1989). Thus, the trial court properly exercised its discretion by considering the justifications for why Gerken failed to timely respond to State Auto's requests for admissions and whether they represented "compelling reasons."

{¶30} Turning now to the court's factual analysis, Gerken's counsel admitted to the court that he "had a mistaken impression of when the admissions were due," even though he admitted receiving State Auto's email that clearly stated it would grant an extension until August 25, 2011, i.e. a date certain. The court noted that it was "a hard decision to make," but that it was going to deny the motion because Gerken's counsel had not presented a "compelling reason" for his late admissions. We find nothing unreasonable, arbitrary or unconscionable about this conclusion in light of the facts.

{¶31} This was not an isolated incident where Gerken failed to comply with the discovery rules. After failing to timely respond to State Auto's requests for admission, the court warned Gerken it would "incorporate appropriate sanctions" if she did not cure the defects in her discovery responses by the ordered date and would postpone ruling on State Auto's motion to have its requests for admission deemed admitted. Gerken failed to comply with the court's order and at the hearing her counsel admitted that he failed to timely respond due to "lack of attention, lack of care." Thereafter, the court granted State Auto's motion to have its requests for admission deemed admitted.

{¶32} Gerken did not file her motion to amend or withdraw her admissions until over five months after August 25, 2011, the date when the requests for admissions were automatically deemed admitted under Civ.R. 36(A). Thus, State Auto was justified in relying on the deemed admissions for over five months until Gerken filed her motion in February 2012. Gerken argues State Auto had not yet filed its motion for summary judgment when the court ruled on her motion, and therefore it cannot show any prejudice. State Auto counters that it based its expert disclosures on Gerken's admissions. And while Gerken filed her motion to withdraw or amend her deemed admissions two days before State Auto had to identify and disclose its experts, it was not served upon State Auto until after the deadline had passed. In addition, Gerken had refiled this case after voluntarily dismissing the original action against State Auto, so counsel should have had abundant time to become familiar with the case and prepare for discovery.

{¶33} Finally, even though Gerken contends that she met the requirements of Civ.R. 36(B) and accordingly was entitled to amend or withdraw her deemed

admissions, the clear language of the rule affords the trial court a great degree of latitude in deciding the motion even when the movant has provided some factual and logical basis for her untimeliness. *See Garrick*, 8th Dist. Cuyahoga No. 99547, 2013-Ohio-5029, at ¶ 14. The trial court has discretion to decide the motion in a manner it deems just. Here, we cannot conclude that the trial court's decision to deny her motion was unreasonable, arbitrary, or unconscionable even though it is the unanimous consensus of this panel that granting the motion would also have fallen within the range of acceptable results. In essence our decision on this issue reflects the reality that the abuse of discretion standard of review allows the trial court to make a decision that we as reviewing judges find less than perfect. As long as the court's decision is based upon substantiated fact and logical reasoning, we are duty-bound to approve it even though we would not have reached the same conclusion were it ours to make initially.

{¶34} Here the trial judge acknowledged it was a difficult decision to make, and in reaching his decision he emphasized several facts that supported his conclusion. Likewise, his analysis was logical, so we cannot second-guess him from our position, which is far removed from the context of the proceedings in his court.

B. Summary Judgment

{¶35} We review the trial court's decision on a motion for summary judgment de novo. *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 12. "Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate." *Snyder v. Stevens*, 4th Dist. Scioto No. 12CA3465, 2012-Ohio-4120, ¶ 11.

{¶36} Under Civ.R. 56(C), summary judgment is appropriate only if "'(1) no genuine issue of any material fact remains, (2) the 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 construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.'" *DIRECTV, Inc. v. Levin*, 128 Ohio St.3d 68, 2010-Ohio-6279, 941 N.E.2d 1187, ¶ 15, quoting *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9.

{¶37} "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). To meet this burden, the moving party must be able to specifically point to the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, which affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. *Id*.; Civ.R. 56(C).

{¶38} "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial * * *." *Dresher* at 293.

1. The Trial Court's Reliance on Gerken's Admissions

{¶39} In her second assignment of error, Gerken argues that even if the trial court did not abuse its discretion by ordering State Auto's requests for admissions admitted and denying her motion to withdraw or amend, it still erred by granting State Auto summary judgment because genuine issues of material fact remained and State Auto was not entitled to judgment as a matter of law.

{¶40} Initially Gerken argues that although the trial court deemed State Auto's requests for admission admitted, they were still subject to objections at trial and would not be admissible. Consequently, she argues that the admissions "cannot be relied upon at the summary judgment stage either." However, Gerken cites no Ohio case law or rule to support her claim and Civ.R. 36(B) directly contradicts her assertion. As we have already decided, the trial court did not abuse its discretion by denying Gerken's motion to withdraw or amend her admissions and therefore under Civ.R. 36(B) any matter admitted under the rule was "conclusively established" in the pending action. Moreover, the cases cited by Gerken are based on federal practice and state that when a party seeks to introduce Rule 36 admissions at trial they are subject to "all pertinent objections to admissibility which may be interposed at trial." *Broy v. Indland Mutual Ins. Co*., 160 W.Va. 131, 134, 233 S.E.2d 131 (1977) (trial court correctly refused to read all requests for admissions to jury when there were portions containing irrelevant and prejudicial material); *Walsh v. McCain Foods, Ltd.*, 81 F.3d 722 (7th Cir.1996) (admissions are still subject to limitation on hearsay evidence and must fit within an exception to be properly admitted at trial). However, Gerken makes no claim based on the Ohio Rules of Evidence regarding why her admissions would be inadmissible at trial. Rather, she complains of the form and language of the requests for admissions,

and that the admissions identified the date of the fire as October 14, 2008, instead of October 15, 2008. Thus, we reject Gerken's argument that the trial court erred by relying on her admissions in deciding State Auto's motion for summary judgment.

2. Breach of Contract

{¶41} On her breach of contract claim Gerken argues the trial court erred as a matter of law by concluding that State Auto's insurance policy "required [her] to repair or replace her fire ravaged home before [it] was liable for more than * * * the actual cash value of the damage done to [her] home." Gerken points to Section C.2.b. of the policy's Loss Settlement provision and contends that State Auto should have paid her the policy limit of $126,000 for damage to her home. However, Gerken's argument is directly contradicted by her admissions and unsupported by the policy's language.

{¶42} Gerken's admissions include:

> 17. Admit that the total payment made by State Auto to you for the damage to the Building as a result of the October 14, 2008 fire loss was $72,586.92.
>
> 18. Admit that the $72,586.92 is the actual cash value for the damage to the building.
>
> 19. Admit that under the Loss Settlement Provisions of State Auto's Policy, you are only entitled to recover the actual cash value of the building until repair or replacement is complete.

Under Civ.R. 36(B) Gerken's admissions "conclusively established" that State Auto paid her the actual cash value for the damage to her home and that under the Loss Settlement provision of her policy, she is only entitled to recover this amount until she repairs the home.

{¶43} Moreover, the language of the policy does not support her position. The insurance policy issued by State Auto to Gerken covered both real and personal

property at her vacation home. Under the policy, State Auto's limit of liability for Gerken's dwelling was $126,000 and $88,200 for her personal property. Section "C. Loss Settlement" in "Homeowners 3 – Special Form" of the policy states:

> Covered property losses are settled as follows:
> 1. Property of the following types:
> a. Personal property * * * at actual cash value at the time of the loss but not more than the amount required to repair or replace.
>
> 2. Buildings covered under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:
> a. If, at the time of the loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of any deductible and without deduction for depreciation, but not more than the least of the following amounts:
> (1) The limit of liability under this policy that applies to the building
> (2) The replacement cost of that part of the building damaged with material of like kind and quality and for like use; or
> (3) The necessary amount actually spent to repair or replace the damaged building.
> * * *
> b. If, at the time of the loss, the amount of insurance in this policy on the damaged building is less than 80% of the full replacement of the building immediately before the loss, we will pay the greater of the following amounts, but not more than the limit of liability under this policy that applies to the building:
> (1) the actual cash value of that part of the building damaged
> (2) That proportion of the cost to repair or replace, after application of any deductible and without deduction for depreciation, that part of the building damaged, which the total amount of the insurance in this policy on the damaged building bears to 80% of the replacement cost of the building.
> * * *
>
> d. We will pay no more than the actual cash value of the damage until actual repair or replacement is complete. Once actual repair or replacement is complete, we will settle the loss as noted in 2.a. and b. above.
> However, if the cost to repair or replace the damage is both:

> (1) Less than 5% of the amount of insurance in this policy on the building; and
> (2) Less than $2,500;
> We will settle the loss as noted in 2.a and b. above whether or not actual repair or replacement is complete.
> e. You may disregard the replacement cost loss settlement provisions and make claim under this policy for loss to buildings on an actual cash value basis. You may then make claim for any additional liability according to the provisions of this Condition C. Loss Settlement, provided you notify us of your intent to do so within 180 days after the date of loss.

{¶44} Therefore, under Section 2.e of the Loss Settlement provision, she was entitled to make a claim for the loss to home on an actual cash value basis and then make a claim for additional liability in accordance with Loss Settlement provision, contingent upon notifying State Farm within 180 days of her intent to do so. Although Gerken asserts that "she sent multiple communications to State Auto within 180 days of the * * * fire advising State Auto that she would seek additional liability from State Auto for the fire loss to her house above beyond what State Auto determined the actual cash value to be," she fails to point to anywhere in the record to support her assertion. In addition, she makes no argument that she ever actually made a claim for additional liability in accordance with the Loss Settlement provision as required under Section 2.e. And because Section 2.d makes it clear that State Auto would not pay more than the actual cash value of the damage until Gerken completed repairs to her home, we reject her argument that the trial court erred by entering summary judgment on her breach of contract claim.

3. Bad Faith

{¶45} Regarding her claim of bad faith, Gerken argues that the trial court erred by granting State Auto summary judgment because it: 1.) failed to "fully understand its

policy with respect to what it owed [her] for the damage done to her house, and * * * claim for personal property loss"; 2.) failed to "timely provide [her] with information" about her claims upon request; and 3.) "unreasonably and unjustifiably failed to timely pay Ms. Gerken's personal property claims."

{¶46} "[A]n insurer has the duty to act in good faith in the handling and payment of the claims of its insured." *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 452 N.E.2d 1315 (1983), at paragraph one of the syllabus, following and extending *Hart v. Mut. Ins. Co.*, 152 Ohio St. 185, 87 N.E.2d 347 (1949). A breach of this duty gives rise to a tort action. *Id.* "In a 'bad faith' action, the insurer's liability is not dependent on a breach of the insurance contract." *Captain v. United Ohio Ins. Co*., 4th Dist. Highland No. 09CA14, 2010-Ohio-2691, ¶ 22, citing *Hoskins* at 276. "Rather, the liability arises from the breach of the positive legal duty imposed by law due to the relationships of the parties." *Hoskins* at 276; *Captain* at ¶ 22.

{¶47} The Supreme Court of Ohio has "move[d] away from an intent-based standard and resume[d] use of the 'reasonable justification' standard in bad faith cases-regardless of whether the allegations are predicated on the insurer's refusal to pay a claim, refusal to defend its insured against a third-party claim, or other action or inaction in handling a claim." *Captain* at ¶ 29, following *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 644 N.E.2d 397 (1994), paragraph one 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"). Thus, to prevail on her claim of bad faith, Gerken must demonstrate that

State Auto "lacked a reasonable justification for the manner in which it handled [her] claims * * *." *Captain* at ¶ 29.

{¶48} "An insurer lacks reasonable justification when it acts in an arbitrary or capricious manner." *Captain* at ¶ 30, citing *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 277, 452 N.E.2d 1315 (1983). The term "arbitrary" means "[w]ithout fair, solid, and substantial cause and without reason given; without any reasonable cause; in an arbitrary manner * * * fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment depending on the will alone; absolutely in power; capriciously; tyrannical; despotic." *Thomas v. Mills*, 117 Ohio St. 114, 121, 157 N.E. 488 (1927); *Captain* at ¶ 30. Similarly "caprice" is defined as " ' "[w]him, arbitrary, seemingly unfounded in motivation * * *." ' " *Captain* at ¶ 30, quoting *4D Investments, Inc. v. City of Oxford*, 12th Dist. Warren. No. CA98-04-082, 1999 WL 8357, *2, in turn quoting *Black's Law Dictionary* 192 (5th Ed.1979).

{¶49} Here, Gerken has failed to demonstrate that State Auto acted arbitrarily or capriciously in processing her claims. Although Gerken concedes State Auto ultimately paid her the policy limit of $88,200 for her personal property loss, she claims State Auto acted in bad faith by delaying payment for eight months and she cites several reasons why the delay was "unreasonable" and without "justification."

{¶50} Initially Gerken argues that State Auto returned her personal property claim forms "several times" due to adjuster's errors. She claims that after she submitted the forms, State Auto returned them and requested that she include the date of purchase for each item so it could calculate their actual cash value. She asserts this

information was unnecessary because the policy "provided for the payment of the replacement cost of the various items lost in the fire without depreciation if the replacement costs of a particular item did not exceed $500," and the "vast majority of [her] claims" were under that threshold.

{¶51} "Part F – Replacement Cost Coverage – Personal Property" of the "Defender Option Endorsement" portion of Gerken's policy states:

> A. Eligible Property
> 1. Covered losses to the following property are settled at replacement cost at the time of the loss:
> a. Coverage C, Personal Property
> * * *
> C. Replacement Cost Loss Settlement Condition
> The following loss settlement condition applies to all property described in A. above:
> * * *
> 2. If the cost to repair or replace the property described in A. above is more than $500, we will pay no more than the actual cash value for the loss until the actual repair or replacement is complete.

{¶52} Although Gerken contends that the $500 threshold in the Replacement Cost Loss Settlement Condition applied to each item of personal property individually, it was not arbitrary or capricious for State Auto to conclude that it applied to her total claim for personal property lost. The policy's mere ambiguity is not sufficient to demonstrate bad faith; Gerken must show that the State Auto acted without any reasonable justification by returning her claim form and requesting the date of purchase for each item so that it could calculate actual cash value of the items. Because she has failed to do so, we find her argument meritless.

{¶53} Likewise, State Auto did not act arbitrarily or capriciously when it returned Gerken's form because it failed to contain the necessary "fraud language." R.C. 3999.21(B) provides:

> all claim forms issued by an insurer, for use by persons in * * * submitting a claim for payment pursuant to a * * * shall clearly contain a warning substantially as follows: "Any person who, with intent to defraud or knowing that he is facilitating a fraud against an insurer, submits an application or files a claim containing a false or deceptive statement is guilty of insurance fraud.

Although State Auto's adjuster may have been at fault for initially providing Gerken with a form that omitted the necessary fraud language, it clearly had a reasonable justification for asking her to resubmit the form that contained the language required by law.

{¶54} Gerken also complains that State Auto "could have contacted [the cleaning contractor] long before March 18, 2009," to confirm that he did not clean any of the property she claimed was lost in the fire. However, State Auto contacted the contractor approximately six weeks after receiving Gerken's updated inventory form with the fraud language. Also during this time it contacted a third party vendor for pricing. Thus, we cannot say that State Auto's actions were arbitrary or capricious.

{¶55} Finally, Gerken asserts that State Auto demonstrated bad faith by "suggesti[ng] that it could not pay [her] property damage claim because it did not receive a proof of loss form [from her] until late May, 2009." She argues "the subject policy only requires a proof of loss form if State Auto requested one." Specifically she contends the policy only required her to submit the form upon State Auto's request and "[i]f the proof of loss form was so important, then there can be no justifiable reason for State Auto to wait more than six months to request one."

{¶56} State Auto sent Gerken a letter in April 2009, advising her to file a sworn statement of proof of loss and that it was "investigating the facts and circumstances surrounding this loss under a full Reservation of Rights because of questions regarding

the existence, scope, amount, value and age of the kinds of personal property claimed by you on your personal property inventory." Thus, the record shows that based on Gerken's personal property inventory form submitted in February 2009, State Auto was requesting a statement of proof of loss to further investigate her claim. Its request was not arbitrary or capricious. And because we have already found that State Auto was not obligated to pay more than the actual cash value of the damage to her real property until Gerken completed repairs to her home, we reject her argument that the trial court erred as a matter of law by granting State Auto summary judgment.[4]

IV. CONCLUSION

{¶57} In summary, under Civ.R. 36(A) State Auto's requests for admissions were automatically deemed admitted when Gerken failed to timely respond and the trial court did not err by ordering the admissions admitted. The trial court also did not abuse its discretion by denying her motion to withdraw or amend the deemed admissions based on the facts of this case and we overrule her first assignment of error. Additionally, because Gerken failed to demonstrate that State Auto acted without reasonable justification when processing her claim for personal property loss, we reject her argument that the trial court erred by granting summary judgment in its favor on her bad faith claim. Likewise, we reject her argument that the trial court erred by granting summary judgment on her claim of breach of contract because based on her deemed admissions and the policy's language there was no genuine issue of material fact and State Auto was entitled to judgment as a matter of law. Accordingly, we overrule her second assignment of error and affirm the trial court's judgment.

[4] Gerken does not make an argument concerning the trial court's entry of summary judgment on her claim for declaratory judgment. Likewise, we do not address it.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.