[Cite as *Intercity Auto Sales, Inc. v. Evans*, 2011-Ohio-1378.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95778

INTERCITY AUTO SALES, INC.

PLAINTIFF-APPELLANT

vs.

JAMES E. EVANS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-703686

BEFORE: Rocco, J., Kilbane, A.J., and Blackmon, J.

RELEASED AND JOURNALIZED: March 24, 2011

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KENNETH A. ROCCO, J.:

{¶ 1} Plaintiff-appellant Intercity Auto Sales, Inc. appeals from the trial court order that granted summary judgment to defendant-appellee Allstate Insurance Company on Intercity's complaint.

{¶ 2} Intercity brought claims against Allstate for "bad faith" and "punitive damages." It presents four assignments of error in which it claims summary judgment on those claims was improper. This court disagrees.

Consequently, Intercity's assignments of error are overruled, and the trial court's order is affirmed.

{¶ 3} Intercity filed its complaint in this action against James Evans and Allstate. In Count One, Intercity alleged that Evans negligently operated his vehicle in reverse, thereby proximately causing "physical damage" to an automobile owned by Intercity, and that Evans accepted liability for his negligence.

{¶ 4} In Count Two, Intercity alleged that Allstate "insured" Evans, "accepted liability on behalf of its insured," but, after an inordinate period of time, "refused to pay" for Intercity's full loss of the use of its vehicle. Intercity claimed Allstate acted in "bad faith" in processing "this claim."

{¶ 5} In Count Three, Intercity asserted a claim for "punitive damages" due to Allstate's "extreme and outrageous" conduct in three respects, viz., "not looking at" Intercity's vehicle or providing a "comparable rental car" for Intercity's use, in unnecessarily "extending the loss of use" of the vehicle to Intercity, and in "attempting to require that [Intercity] take the vehicle to another body shop * * * ."

{¶ 6} Allstate filed an answer in which it admitted it insured Evans and accepted his liability for the accident, but denied the remaining pertinent

allegations. Evans also filed an answer, admitting his involvement in an accident, but denied the remaining pertinent allegations.

{¶ 7} Subsequently, Allstate filed a motion for summary judgment on Intercity's claims against it. Allstate argued that since the policy of insurance was with Evans, and since Intercity had not obtained a judgment against Evans on its claim of negligence, Intercity had no cognizable claim against Allstate. Allstate did not attach any evidentiary material to its motion, since its argument was based solely on Ohio law.

{¶ 8} Intercity filed a brief in opposition to Allstate's motion. Intercity argued that it had brought its claim against Allstate because Allstate had "committed a tort against" Intercity. Intercity attached to its brief the affidavit of George R. Sapir, a "duly authorized officer." Although Sapir did not profess to have any personal knowledge, his affidavit nevertheless restated the pertinent allegations of the complaint.

{¶ 9} After Allstate filed a reply brief, the trial court granted its motion for summary judgment on the complaint. The trial court informed Intercity that it "must first obtain judgment against Evans before being permitted to maintain an action against Evans' insurer."

{¶ 10} Intercity thereafter dismissed its claims against Evans with prejudice, and obtained a final order from the trial court pursuant to Civ.R. 54. Intercity presents the following assignments of error in this appeal.

{¶ 11} "I. The trial court did not properly grant Appellees' [sic] motion for summary judgment.

{¶ 12} "a. appellant demonstrated the existence of genuine issues of material fact with respect to the claim of bad faith against Appellee.

{¶ 13} "b. appellant demonstrated the existence of genuine issues of material fact with respect to their [sic] claim of actual notice against Appellee.[1]

{¶ 14} "II. The trial court improperly granted summary judgment on issues of damages and punitive damages that are properly questions of fact for a jury to decide.

{¶ 15} "III. The trial court did not consider that Appellant's case against Appellee was as an actual tortfeasor, not one of a third-party beneficiary.

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[1]Since the record fails to reflect Intercity raised a claim of "actual notice" in the trial court, this court will not address it. *Tohline v. Cent. Trust Co., N.A.* (1988), 48 Ohio App.3d 280, 283, 549 N.E.2d 1223, cause dismissed (1989), 41 Ohio St.3d 703, 534 N.E.2d 1202.

{¶ 16} "IV. The trial court did not properly evaluate the cases cited by Appellee in making a determination as to the propriety of granting summary judgment."

{¶ 17} Although phrased in alternate ways, Intercity simply argues that summary judgment on its claims against Allstate was improper, because the issues presented in this case did not involve a matter of law. Its argument is rejected.

{¶ 18} Civ.R. 56(C) provides in pertinent part as follows:

{¶ 19} " * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. * * * "

{¶ 20} In reviewing a trial court's ruling on a motion for summary judgment, an appellate court applies the same analysis a trial court is required to apply in the first instance. *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829, 586 N.E.2d 1121. If a document presented by a party does not fall within any of the categories listed in the

rule, the evidence can only be submitted into evidence by way of an affidavit. *Fisher v. Alliance Mach. Co.*, Cuyahoga App. No. 94936, 2011-Ohio-338, ¶39-40.

{¶ 21} According to Civ.R. 56(E), "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶ 22} Although Intercity asserted genuine issues of material fact existed in this case, it presented no evidence cognizable under Civ.R. 56 to demonstrate its assertion. As this court recently observed, Ohio insurance law "does not permit an injured party to sue an insurance company, of which it is not an insured, directly without first obtaining a judgment against the

tortfeasor." *Univ. Hosps. Health Sys. v. Total Technical Servs., Inc.*, Cuyahoga App. No. 93708, 2010-Ohio-2606, ¶11, citing *Chitlik v. Allstate Ins. Co.* (1973), 34 Ohio App.2d 193, 299 N.E.2d 295, R.C. 3929.06(B) and R.C. 2721.02(B). Intercity's assertion that Allstate became, itself, a tortfeasor by its conduct toward Intercity has no support in law.

{¶ 23} Clearly, an insurance company has a duty to act in good faith in settling claims, but that duty is owed only to the insured. *Pasipanki v. Morton* (1990), 61 Ohio App.3d 184, 185, 572 N.E.2d 234. The duty arises independent of the contract of insurance, and permits *the insured* to bring a cause of action against his insurer in tort. *Stevenson v. First Am. Title Ins. Co.*, Fairfield App. No. 05-CA-39, 2004-Ohio-6461, ¶23, citing *Hoskins v. Aetna Life Ins. Co.*(1983), 6 Ohio St.3d 272, 452 N.E.2d 1315, paragraph one of the syllabus.

{¶ 24} The insurer owes no duty to third parties. *Pasipanki*. A third party, therefore, has no cause of action for bad faith against the tortfeasor's insurance company. *Schneider v. Eady*, Lorain App. Nos. 07CA009273 and 07CA009305, citing *Chitlik*.

{¶ 25} Intercity strenuously argued that Allstate's actions toward it gave rise to liability in tort.[2] However, Intercity can cite no authority that actually supports its argument. Intercity obtained no judgment against Evans to enforce against his insurer; indeed, the record reflects Intercity settled with Evans. This sort of situation was considered by the Ninth District in *Calich v. Allstate Ins. Co.*, Summit App. No. 21500, 2004-Ohio-1619, which expressed the following concern at ¶8:

{¶ 26} " * * * Allowing the filing of such a bad faith claim can potentially encourage a judgment-proof tortfeasor to conspire with the plaintiff and enter an agreement for an astronomical sum with a full release to the tortfeasor. Even if the tortfeasor is not judgment-proof, he still escapes liability as a result of the full release. This result is extremely beneficial to the tortfeasor, who escapes liability, and to the plaintiff, who has the potential to gain a sum of money that greatly exceeds his or her actual injuries. Such a 'manufacturing' of these bad faith claims, as between the tortfeasor and the plaintiff, puts an insurance company in a precarious situation, without a legitimate opportunity to properly protect itself from a bad faith claim. This Court will not promote the manufacturing of these bad faith claims. More

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[2]Intercity argues in its appellate brief that the complaint stated a claim for "detrimental reliance." Once again, this claim was not raised in the trial court, therefore, it will not be addressed on appeal.

importantly, an adjudicated * * * judgment must exist, which evinces that an insurance company has been given a reasonable opportunity to protect its interests and rights."

{¶ 27} Since Intercity had no cognizable claim against Allstate for bad faith, its claim for punitive damages also failed. The Ohio Supreme Court has held that "no civil cause of action in this state may be maintained simply for punitive damages." *Niskanen v. Giant Eagle, Inc.,* 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, ¶13. See, also, *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 650, 1994-Ohio-324, 635 N.E.2d 331, which held that, since "punitive damages are awarded as a mere incident of the cause of action in which they are sought * * *, compensable harm stemming from a cognizable cause of action must be shown to exist before punitive damages can be considered." Intercity had no cognizable cause of action against Allstate in this case, therefore, it had no claim for punitive damages.

{¶ 28} In light of the record and the foregoing, the trial court correctly granted summary judgment in favor of Allstate on Intercity's complaint.

{¶ 29} Consequently, Intercity's assignments of error are overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

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KENNETH A. ROCCO, JUDGE

MARY EILEEN KILBANE, A.J., and
PATRICIA ANN BLACKMON, J., CONCUR