

[Cite as *Cummins v. Greene*, 2002-Ohio-6131.]

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

LARRY E. CUMMINS, ET AL., :
 :
Plaintiffs-Appellees, : Case No. 00CA29
 :
v. :
 :
JANET GREENE, :
 :
Defendant-Appellee, :
 :
and :
 :
WESTFIELD COMPANIES, : DECISION AND JUDGMENT ENTRY
 :
Defendant-Appellant. : RELEASED 5-8-02

APPEARANCES:

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EVANS, J.

¹ Appellees Larry E. & Nancy Cummins did not enter an appearance or file a brief in this matter.

{¶1} Defendant-Appellant Westfield Companies appeals the judgment of the Meigs County Court of Common Pleas that dismissed, with prejudice, appellant's cross-claim against Defendant-Appellee Janet Greene. Appellant argues that the trial court erred in determining that appellant failed to prosecute its subrogation claim against Greene at the jury trial. Appellant asserts that the trial court erred in dismissing its claim because appellant's claim was not ripe until after the jury rendered its verdict.

{¶2} For the following reasons, we disagree with appellant's argument and affirm the decision of the trial court.

I. The Trial Court Proceedings

{¶3} Plaintiff-Appellee Larry E. Cummins and Defendant-Appellee Janet Greene were involved in an auto accident. Cummins and his wife sued Greene and their own insurance company, Defendant-Appellant Westfield Companies. Greene's insurance policy had a limit of \$100,000, and the Cumminses asserted that if the jury awarded damages over that limit, appellant would be responsible for the difference, up to the Cumminses' policy limits under the underinsured motorists clause of their policy with Westfield. Appellant filed an answer to the Cumminses' complaint, as well as a cross-claim against Greene for subrogation of any such excess liability.

{¶4} Appellee Greene admitted liability in the automobile accident and a jury trial was held on the issues of proximate cause of the Cumminses' injuries and damages. Appellant participated in

that trial by conducting voir dire, waiving its opening statement, questioning witnesses, and making a closing argument. Appellant attempted to reduce the potential damage award by arguing Larry Cummins had a pre-existing condition and that some of the treatments he underwent were unnecessary.

{¶5} The jury returned a verdict against Greene for \$375,000 and the trial court filed a journal entry reflecting that verdict.

{¶6} Shortly thereafter, appellant filed a motion for summary judgment on its cross-claim against Greene. Greene filed a memorandum in opposition to appellant's motion arguing: (1) that the trial court lacked jurisdiction to consider the motion since motions for summary judgment are pre-trial motions; (2) that genuine issues of material fact existed; and (3) that appellant had waived its cross-claim by not pursuing it at the jury trial. The trial court denied appellant's motion for summary judgment based on its finding that Westfield had waived its subrogation claim as a result of its failure to pursue this claim at trial.

{¶7} Subsequently, appellant filed a motion for a hearing on its cross-claim. Greene responded by arguing that appellant's subrogation cross-claim was *res judicata* because the trial court had already ruled that appellant had waived its claim by not prosecuting it at trial. The trial court denied appellant's motion for hearing.

{¶8} Appellant appealed the trial court's ruling and this Court determined that the entry appealed from was a not a final appealable

order, since the order did not dispose of appellant's claim. *Cummins v. Greene* (Oct. 20, 2000), Meigs App. No. 00CA12, unreported.

{¶9} Upon remand, the trial court dismissed appellant's claim with prejudice.

II. The Appeal

{¶10} Westfield once again appeals and asserts the following assignment of error: "The trial court erred in ruling that Defendant-Appellant Westfield Companies waived its cross-claim by not prosecuting same [*sic*] at trial.

A. Dismissal of Appellant's Cross-Claim

{¶11} In its sole assignment of error, appellant argues that the trial court erred by dismissing appellant's cross-claim against Greene for failure to prosecute, because that claim was not ripe until the jury awarded the Cumminses damages in excess of Greene's insurance coverage.

1. Standard of Review

{¶12} Civ.R. 41(B)(1) provides, "Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." The decision to dismiss a case pursuant to Civ.R. 41(B)(1) is within the sound discretion of the trial court. See *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 437 N.E.2d 1199; *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 684 N.E.2d 319.

{¶13} Accordingly, an appellate court's review of a dismissal pursuant to Civ.R. 41(B)(1) is confined to a determination of whether the trial court abused its discretion. See *id.*; *Jones v. Hartranft* (1997), 78 Ohio St.3d 368, 678 N.E.2d 530. An abuse of discretion "connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court ***." *Pembaur v. Leis*, 1 Ohio St.3d at 91, 437 N.E.2d at 1201, quoting *Lever v. Reed Bros. Express, Inc.* (1951), 154 Ohio St. 491, 96 N.E.2d 781, paragraph two of the syllabus. When conducting our review using the "abuse of discretion" standard, we may not substitute our judgment for that of the trial court. See *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 559 N.E.2d 1301.

2. Counterclaims and Cross-Claims

{¶14} Civ.R. 13(G) provides:

{¶15} "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant." Civ.R. 13(G).

{¶16} In the case *sub judice*, appellant filed a cross-claim against Greene, appellee herein and co-defendant below. Unlike

counterclaims, cross-claims are never compulsory. "The chief difference between the two claims, as it relates to this matter, is that counterclaims can be permissive or compulsory, while cross-claims are *only* permissive." (Emphasis *sic.*) *Templeton v. Sheets* (Sept. 21, 2001), Lawrence App. No. 00CA33, unreported, citing *Huntington Nat'l Bank v. Ross* (1998), 130 Ohio App.3d 687, 694, 720 N.E.2d 1000, 1005. The assertion of cross-claims is at the discretion of the parties. See *id.*, citing Stephani and Weissenberger, Weissenberger's Ohio Civil Procedure 2001 Litigation Manual (2001) 118. "Thus, if a cross-claim is not brought, the defendant would *not* be barred from asserting that same claim as a cause of action in a subsequent lawsuit." (Emphasis *sic.*) *Templeton v. Sheets, supra*, citing *Huntington Nat'l Bank v. Ross*, 130 Ohio App.3d at 687, 720 N.E.2d at 1005.

{¶17} Appellant chose to file a cross-claim against Greene in the trial court as a part of the action brought by the Cummins. Appellant was under no obligation to bring that claim at that time. See *id.* Had it chosen to, appellant could have filed a separate complaint against Greene, following the conclusion of the trial.

{¶18} Appellant now claims, however, that its cross-claim against Greene was premature and was not ripe at the time that it was filed because appellant would not know whether it would have a subrogation claim against Greene until a judgment in excess of Greene's coverage limits was entered against Greene.

{¶19} Civ.R. 13(G) resolves appellant's argument. The rule states that a "cross-claim may include a claim that the party against whom it is asserted is *or may be liable* to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant." (Emphasis added.) Civ.R. 13(G). Accordingly, a party may assert a cross-claim against a co-party even if the co-party's liability to the cross-claimant has not yet been established.

{¶20} Thus, appellant's claim was not premature, nor did it lack the requisite ripeness to be resolved during the trial. Once appellant filed its cross-claim against Greene, it had a duty to prosecute that claim to judgment, especially in light of appellant's involvement during the course of the trial. See Civ.R. 41(B)(1). In order to do so, at the conclusion of the trial, appellant could have requested that two verdict forms go with the jury during their deliberations. That way, should the jury determine that Greene's liability for the Cummins's damages was in excess of \$100,000, as it did in this case, it could then enter a verdict on appellant's subrogation claim.

{¶21} To endorse appellant's argument would result in a multiplicity of suits and obviate the ability of parties to consolidate subrogation claims pursuant to Civ.R. 13(G) because all subrogation claims, by appellant's assessment, would lack the requisite ripeness.

{¶22} Accordingly, we find that the trial court did not abuse its discretion by dismissing appellant's cross-claim, as a result of appellant's failure to prosecute that claim at the original trial, because appellant voluntarily chose to pursue its subrogation claim against Greene through that course of action.

B. Prejudice from the Disclosure of Insurance Information

{¶23} Appellant also notes that the disclosure to the jury of the extent of insurance coverage would create the potential for great prejudice and hinder a fair adjudication.

{¶24} We agree with appellant that the potential for prejudice, resulting from the disclosure of insurance information when damages and liability are at issue, is great. *Cf.* Evid.R. 411. However, Civ.R. 42(B) permits the trial court to conduct separate trials on individual issues or claims. Civ.R. 42(B).

{¶25} In this case, appellant's cross-claim against Greene was not bifurcated pursuant to Civ.R. 42(B). Moreover, appellant did not seek bifurcation of its subrogation claim. Thus, appellant could have sought that its cross-claim be adjudicated separately from Greene's liability and the amount of the Cumminses' damages. However, it chose not to pursue this available course of action, but instead chose to participate in the original action, from pleading through final argument.

III. Conclusion

{¶26} For the foregoing reasons, appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

Kline, J.:

{¶27} I respectfully dissent. Because I would find that Westfield Companies' claim was not ripe for adjudication until after the jury returned a verdict in excess of Greene's insurance policy limits, I would reverse the trial court's decision.

{¶28} Civ.R. 41(B)(1) provides, "where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." Although this provision grants the trial court discretion to dismiss a case where the plaintiff fails to comply with a court order, the trial court must not abuse that discretion.

{¶29} "To determine whether an issue is ripe for judicial review, the court must weigh (1) the likelihood that the alleged future harm will ever occur, (2) the likelihood that delayed review will cause hardship to the parties, and (3) whether the factual record is sufficiently developed to provide fair adjudication." *Stewart v. Stewart* (1999) 134 Ohio App.3d 556, 558 citing *Ohio Forestry Assn., Inc. v. Sierra Club* (1998), 523 U.S. 726, 731-733. "Generally a claim is not ripe if the claim rests upon 'future events that may or

may not occur as anticipated, or may not occur at all.'" *Stewart* at 558-559, quoting *Texas v. United States* (1998), 523 U.S. 296, 300.

{¶30} Applying these factors, I would find that Westfield Companies' subrogation claim was not ripe for adjudication during the jury trial. First, it was unclear during the trial below whether Westfield Companies would be obligated to pay any damages under the underinsured motorists clause of the insurance policy. If the jury found for Greene or awarded damages under one hundred thousand dollars, it would not. Therefore, it was just as likely that the future harm would not occur at all. Second, delayed consideration of the subrogation claim would have caused no hardship to either of the parties and actually avoids the issue of presenting evidence to the jury of the liability limits of Greene's and Cummins' insurance policies. Consideration of insurance policy limits by a jury is inappropriate when the amount of damages is at issue. *Cf.* Evid.R. 411 (evidence of fact of insurance inadmissible when liability is at issue). Third, the factual record, *i.e.*, the amount of damages awarded to the Cummins, was not developed until after the jury's verdict. Thus, the subrogation issue was not ripe for adjudication until the jury's verdict, and Westfield Companies' claim rested upon future events that might have not occurred at all.

{¶31} Therefore, Westfield Companies could not fail to prosecute its claim during the jury trial, as its claim was not ripe until after the jury's verdict. Accordingly, I would find that the trial

court abused its discretion in dismissing Westfield Companies' claim for lack of prosecution and reverse the judgment of the trial court.

JUDGMENT ENTRY

It is ordered that the **JUDGMENT BE AFFIRMED** and that appellee recover of appellant costs herein taxed.

The Court finds that there were reasonable grounds for this appeal.

It is further ordered that a special mandate issue out of this Court directing the **MEIGS 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. Exceptions.

Harsha, J.: Concurs in Judgment and Opinion.
Kline, J.: Dissents with Dissenting Opinion.

FOR THE COURT

BY: _____
David T. Evans, 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.