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**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

JOANN DIFRANCESCO  
Plaintiff

MONTENERODOMO CITIZEN'S CLUB, ET AL  
Defendant

Case No: CV-22-962428

Judge: CASSANDRA COLLIER-WILLIAMS

**JOURNAL ENTRY**

96 DISP.OTHER - PARTIAL

ORDER ATTACHED AND ORDERED RECORDED. OSJ.  
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER  
PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL  
PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

0.8.5.  
Judge Signature

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Date

**FILED**  
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CLERK OF COURTS  
CUYAHOGA COUNTY

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

**MOTORISTS MUTUAL INSURANCE )  
COMPANY, )**

Case No. CV-21-956316

Plaintiff, )

JUDGE CASSANDRA COLLIER-WILLIAMS

v. )

**JOANN DIFRANCESCO, ET AL. )**

**ORDER**

Defendants. )

..... )  
**JOANN DIFRANCESCO, )**

Case No. CV-22-962428

Plaintiff, )

v. )

**MONTENERODOMO )  
CITIZENS CLUB, INC, ET AL. )**

Defendants. )

..... )  
**JUDGE C. COLLIER-WILLIAMS:**

This cause came for consideration upon the Motion of Defendant, the Montenerodomo Citizens Club, Inc., to Dismiss All Claims In Plaintiff's Complaint; the Motion to Dismiss of Chubb North America Claims and Chubb North America Claims, Financial Lines Division, Westchester Specialty Group; and Defendant Motorist Mutual Insurance Company's Motion for

Judgment on the Pleadings. Briefs in Opposition to all the motions were filed by Plaintiff Joann DiFrancesco. However, each opposition is almost identical and fails to address many of the substantive arguments in the various defendants' motions. Furthermore, each opposition by DiFrancesco incorrectly argues that the Defendants' Motions are applying the improper standard of review for a 12(B)(6) motion to dismiss, stating that the Defendants are each trying to hold her to a federal plausibility standard instead of a notice-pleading standard. The word "plausibility" appears nowhere in any of the Defendants' Motions.

For the reasons set forth more fully below, this Court GRANTS Defendants' Motions in their entirety.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On November 24, 2021, Motorists Mutual Insurance Company filed a complaint against Joann DiFrancesco ("DiFrancesco") to recover \$73,743.00 that Motorists paid to its insured, the Montenerodomo Citizens Club, Inc. ("MCC"). MCC is an Ohio non-profit corporation. DiFrancesco served as a director/trustee of MCC and was employed as its treasurer until 2019. MCC made an insurance claim with Motorists related to certain missing funds. Motorists paid the claim and sued DiFrancesco as MCC's subrogee to recover the amount paid. Specifically, Motorists alleges that while an employee of MCC, DiFrancesco improperly converted \$73,743.00 to her own use, breaching her duty of good faith and loyalty to the Montenerodomo Citizens Club. The first lawsuit will be referred to as the "Subrogation Action."

In the Subrogation Action, DiFrancesco filed an Answer and Third-Party Complaint against MCC. In her Third-Party Complaint, DiFrancesco alleged the following causes of action against MCC: (1) Declaratory Judgment, (2) Action for an Accounting, (3) Defamation Per Se, and (4) Negligence/Breach of Fiduciary Duty. MCC filed a Motion to Dismiss the Third-Party

Complaint and DiFrancesco opposed it. On March 22, 2022, Judge Wanda Jones granted MCC's Motion to Dismiss the Third-Party Complaint. See Docket, CV-21-956316, Journal Entry (03/22/2022).

On April 25, 2022, DiFrancesco instituted an entirely new action by filing a nine-count Complaint against MCC, Motorists Mutual Insurance Company, United States Liability Ins. Co, and Chubb North America Claims, purporting to seek insurance coverage from the different insurance companies, along with asserting various tort claims against MCC. In her new Complaint, DiFrancesco brought the following causes of action: (1) Declaratory Judgment, (2) Action for an Accounting, (3) Defamation Per Se, (4) Negligence/Breach of Fiduciary Duty, (5) Intentional Infliction of Emotional Distress, (6) Negligent Infliction of Emotional Distress, (7) Civil Conspiracy to Commit Fraud, (8) Malicious Prosecution, and (9) Abuse of Process. Defendants Motorists Mutual Insurance Company and United States Liability Insurance Company filed Answers to the Complaint. The Subrogation Action and newly filed action were consolidated in July of 2022 and subsequently transferred to the Commercial Docket.

## **II. APPLICABLE LAW AND ANALYSIS**

### **A. MCC's Motion to Dismiss**

On May 25, 2022, MCC filed its Motion to Dismiss. Defendant MCC moved to dismiss all of Plaintiff's claims in her Complaint. A motion to dismiss a complaint under Civ. R. 12(B)(6) for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. Of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). In order to dismiss a complaint for failure to state a claim upon which relief can be granted, the trial court must find beyond doubt that the plaintiff can prove no set of facts warranting relief after it presumes all factual allegations in the complaint are true and

construes all reasonable inferences in the plaintiff's favor. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 680 N.E.2d 985 (1997). Further, under the notice pleading requirements of Civ.R. 8(A)(1), the plaintiff must plead sufficient, operative facts to support recovery under his claims to survive a motion to dismiss and may not simply state legal conclusions. *Tuleta v. Med. Mut. of Ohio*, 2014-Ohio-396, 6 N.E.3d 106, ¶ 12 (8th Dist.).

Counts One through Four of DiFrancesco's Complaint were previously dismissed in the Subrogation Action when she brought them as a Third-Party Complaint against MCC. Counts One through Four must be dismissed pursuant to res judicata. However, this Court will address each count of DiFrancesco's Complaint to show that it also fails on the merits.

**1. Declaratory Judgment**

Defendant MCC moves to dismiss Count One for Declaratory Judgment, stating that there is no controversy between MCC and DiFrancesco regarding whether one of the insurance companies provide liability coverage to DiFrancesco for Motorists' claims in the Subrogation Action. Count One of the Complaint seeks a declaration of the parties' rights and obligations under "the policy or policies" without identifying the insurer(s), Motorists, USLIC or Chubb, issuing "the policy or policies":

25. DiFrancesco, in her various positions at MCC, should have been covered by some type of Directors' and Officers' or Errors and Omission insurance coverage.

26. When the subrogation lawsuit was filed, DiFrancesco wrote to the President of the organization, without response, asking about insurance issues.

27. There should be insurance coverage for her work at MCC that covers the allegations against her for her work at MCC.

28. DiFrancesco is entitled to a declaration declaring the parties' rights and obligations under the policy or policies with respect to her claims for defense and/or indemnity arising out of the allegations in the subrogation complaint.

Complaint at ¶ 25-28.

An action for declaratory judgment enables a court to declare the rights, status, and other legal relations of the parties. *Priore v. State Farm Fire & Cas. Co.*, 8th Dist. Cuyahoga No. 99692, 2014-Ohio-696, ¶ 14; Civ.R. 57; R.C. 2721.02(A). Typically, an insured can file a declaratory judgment action to establish an insurer's obligations where there is a controversy between the insurer and insured as to the fact or extent of liability under a policy. *Id.* In order to obtain relief under the Declaratory Judgment Act, R.C. 2721.01, et seq., a party must establish the following: "(1) a real controversy exists between the parties; (2) the controversy is justiciable; and (3) speedy relief is necessary to preserve the rights of the parties." *Burger Brewing Co. v. Liquor Control Com., Dep't of Liquor Control*, 34 Ohio St. 2d 93, 296 N.E.2d 261 (1973).

As stated in their Motion to Dismiss, MCC "does not take a position one way or the other as to whether Ms. DiFrancesco is entitled to insurance coverage under one of the policies issued to [MCC]." Motion to Dismiss, pg. 5. A claim for coverage is a dispute between the insurance company and the person seeking coverage, not the named insured. Furthermore, this claim was previously dismissed against MCC in the Subrogation Action. Accordingly, this Court finds that, as there is no dispute to resolve between MCC and DiFrancesco regarding insurance coverage, MCC's Motion to Dismiss Count One of Plaintiff's Complaint is granted.

## **2. Action for Accounting**

In Count Two of her Complaint, DiFrancesco seeks an "Action for Accounting."

DiFrancesco states:

32. DiFrancesco is aware of having complained repeatedly about improper financial controls, lack of auditing, lack of checks and balances, through the years all of which have been ignored by MCC.

33. As a result of the financial audits that have been done by MCC in order to put the insurance company on notice and the insurance company's review of these audits and their own internal and external investigations review to pay off creating the need for a subrogation case, the Plaintiff, Joann DiFrancesco is entitled to all of

these records and materials so that her own expert can review these to determine how the defendant or Defendants arrives at their contentions and allegations.

Complaint at ¶ 32-33.

An action for an accounting is an equitable remedy, not a cause of action. *Kobal v. Edward Jones Secs.*, 8th Dist. Cuyahoga No. 109753, 2021-Ohio-1088, ¶14 (upholding trial court's dismissal of claim for "accounting" as it failed to state a cause of action). *See also, Krohn v. Ostafi*, 6th Dist. Lucas No. L-19-1002, 2020-Ohio1536, ¶37. Ohio law has consistently held that an accounting is an equitable remedy and where there is an adequate remedy at law, an equitable remedy is improper. *McNulty v. Pls Acquisition Corp.*, 8th Dist. Cuyahoga Nos. 79025, 79125, 79195, 2002-Ohio-7220, ¶1.

MCC argues that, because an action for accounting is an equitable remedy, Count Two must be dismissed. Furthermore, MCC argues that DiFrancesco's Action for Accounting was previously dismissed in the Subrogation action. The Court agrees with MCC. DiFrancesco may conduct discovery, as a defendant in the Subrogation Action, pursuant to the Ohio Rules of Civil Procedure to obtain the information that she is seeking. Accordingly, MCC's Motion to Dismiss Count Two of Plaintiff's Complaint is granted.

### 3. Defamation

As to her defamation claim, DiFrancesco generally alleges that she did not engage in any criminal behavior while employed for MCC. Because of the allegations lodged against her, she claims that her reputation in the community has been damaged. From the face of her Complaint, it is not clear what statements DiFrancesco is alleging were defamatory, when they were published, and who made them. Again, while notice pleading only requires a claimant to "plead sufficient, operative facts to support recovery under his [or her] claims . . . the complaint must still allege

sufficient underlying facts that relate to and support the alleged claim and may not simply state legal conclusions.” *Evans v. Shapiro*, 4th Dist. Ross No. 18CA3670, 2019-Ohio-3209, ¶ 18.

The elements of a defamation claim are: “(1) that a false statement of fact was made; (2) that the statement was defamatory; (3) that the statement was published; (4) that the plaintiff suffered injury as a proximate result of the publication; and (5) that the defendant acted with the requisite degree of fault in publishing the statement.” *Kanjuka v. MetroHealth Med. Ctr.*, 151 Ohio App.3d 183, 2002-Ohio-6803, 783 N.E.2d 920, ¶ 15 (8th Dist.). Plaintiff has not sufficiently pled these elements under Ohio’s notice-pleading requirements.

Furthermore, DiFrancesco’s claim for defamation was previously dismissed in the Subrogation Action.

As Plaintiff has failed to sufficiently plead a cause of action for defamation against MCC, MCC’s Motion to Dismiss Count Three of Plaintiff’s Complaint is hereby granted.

**4. Negligence/Breach of Fiduciary Duty**

In her Complaint, DiFrancesco alleges the following regarding her negligence/breach of fiduciary duty claim:

42. [MCC] had a responsibility, through its Board of Directors, to maintain proper controls for its Officers and for the collection, accounting, and disbursement of cash and other monies.

43. MCC did not do this. In fact, for many years it was extremely lax in the way that it handled both bar receipts, parking lot receipts, and other receipts that were not accounted for.

44. The Directors owed a high standard of care in managing the money in the organization and failed to do so despite being told they needed to do audits and have better monitoring and control over the monies.

45. MCC ignored their obligations to make sure that the monies were accounted for properly.

46. As a result of that negligence, DiFrancesco has been blamed for losses that she did not create, cause, or contribute to and, instead, brought to the attention of the Board but was ignored.

47. As a result of MCC’s negligence or breach of fiduciary duty not only to JoAnn DiFrancesco, she has been damaged in an amount to be determined at trial.

Complaint at ¶ 43-47.

A claim for breach of a fiduciary duty is essentially a claim for negligence that involves a higher standard of care. *McConnell v. Hunt Sports Ent.*, 132 Ohio App. 3d 657, 687, 725 N.E.2d 1193 (10th Dist. 1999). To recover on a claim for breach of fiduciary duty, a plaintiff must prove the existence of a duty arising from a fiduciary relationship, its breach, and damages proximately caused by the breach. *Id.* A fiduciary has been defined as a person having a duty, created by his or her undertaking, to act primarily for the benefit of another in matters connected with such undertaking. *Stock v. Pressnell*, 38 Ohio St.3d 207, 527 N.E.2d 1235 (1988).

MCC argues that Count Four must be dismissed because DiFrancesco has failed to allege an actionable duty that was owed to her by MCC. “Only when one fails to discharge an existing duty can there be liability for negligence.” *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614. In her Complaint, DiFrancesco alleges that MCC owed a duty to her (and perhaps other members of MCC) to make sure that they had proper financial controls in place for the club’s money. However, corporations, as an entity, do not owe shareholders or members a fiduciary duty. *Radol v. Thomas*, 772 F.2d 244, 258 (6th Cir 1985); *Jordan v. Global Natural Res.*, 564 F. Supp. 59, 68 (S.D. Ohio 1983).

The Court hereby finds that DiFrancesco’s claim for negligence/breach of fiduciary duty fails to state a claim upon which relief may be granted, as she has failed to establish the source of MCC’s duty to her. Additionally, Count Four was previously dismissed in the Subrogation Action. Therefore, MCC’s Motion to Dismiss Count Four of Plaintiff’s Complaint is hereby granted.

**5. Intentional Infliction of Emotional Distress**

DiFrancesco’s claim for intentional infliction of emotional distress alleges that the false accusations against her are of “such a serious nature that any normal person of normal constitution

would (sic) be able to bear it.” Furthermore, she alleges that the criminal charges that have been filed against her have added to the immense stress. Complaint at ¶ 51-52.

To establish a claim for intentional infliction of emotional distress, a plaintiff must prove the following elements: (1) the defendant intended to cause, or knew or should have known that his actions would result in serious emotional distress; (2) the defendant’s conduct was so extreme and outrageous that it went beyond all possible bounds of decency and can be considered completely intolerable in a civilized community; (3) the defendant’s actions proximately caused psychological injury to the plaintiff; and (4) the plaintiff suffered serious mental anguish of a nature no reasonable person could be expected to endure. *Lombardo v. Mahoney*, 8th Dist. Cuyahoga No. 92608, 2009-Ohio-5826, ¶ 6.

“Extreme and outrageous conduct is conduct that goes beyond all possible bounds of decency and is so atrocious that it is ‘utterly intolerable in a civilized community.’” *Lloyd v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 107214, 2019-Ohio-1885, ¶ 14, quoting *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 375, 453 N.E.2d 666 (1983). The reporting of a crime is “ordinary and reasonable” behavior and is not considered “outrageous” as is required to prove a claim of intentional infliction of emotional distress. *Matthias v. Wendy’s of Pearl, Inc.*, 8th Dist. Cuyahoga No. 71721, 1997 Ohio App. LEXIS 4227, \*10 (Sept. 18, 1997).

The Court hereby finds that the alleged conduct does not, as a matter of law, reach the level of extreme and outrageous conduct. Therefore, MCC’s Motion to Dismiss Count Five of Plaintiff’s Complaint is hereby granted.

**6. Negligent Infliction of Emotional Distress**

A cause of action for negligent infliction of emotional distress may only be brought by a bystander to a serious accident. *Paugh v. Hanks*, 6 Ohio St.3d 72, 72, 451 N.E.2d 759 (1983),

syllabus 3. The claim arises when “the plaintiff-bystander reasonably appreciated the peril which took place, whether or not the victim suffered actual physical harm, and, that as a result of this cognizance or fear of peril, the plaintiff suffered serious emotional distress.” *Id.*

As DiFrancesco was not a bystander to a serious accident, and she does not allege as such, the negligent infliction of emotional distress claim against MCC is dismissed as a matter of law. Therefore, MCC’s Motion to Dismiss Count Six of Plaintiff’s Complaint is hereby granted.

#### 7. Civil Conspiracy

To establish a civil conspiracy claim, the plaintiff must prove: (1) a malicious combination of two or more persons, (2) causing injury to another person or property, and (3) the existence of an unlawful act independent from the conspiracy itself. *Goree v. Northland Auto Ent.*, 8th Dist. Cuyahoga No. 108881, 2020-Ohio-3457, ¶ 78.

Here, DiFrancesco alleges that the unlawful act underlying her claim for civil conspiracy is fraud. In order to prevail upon a cause of action for fraud, a plaintiff must show: 1) a representation or, where there is a duty to disclose, concealment of a material fact; 2) knowingly made or concealed; 3) with intent of misleading another into relying upon it; 4) justified reliance upon the misrepresentation or concealment; and 5) injury proximately caused by the reliance. *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 55, 514 N.E.2d 709 (1987).

Civ.R. 9(B) provides that fraud claims must be pled with particularity. The particularity requirements of Civ.R. 9(B) includes “the time, place and content of the false representation, the fact misrepresented, and the nature of what was obtained or given as a consequence of the fraud.” *Pointe at Gateway Condominium Owners’ Assn. v. Schmelzer*, 8th Dist. Cuyahoga Nos. 98761 and 99130, 2013-Ohio-3615, ¶ 65.

In her Complaint, DiFrancesco alleges that MCC and one or more of its agents yet to be identified entered into an agreement to commit a tort or other wrong and acted in furtherance of that agreement to cause JoAnn DiFrancesco to suffer economic loss.” Complaint at ¶61. This allegedly resulted in a “conspiracy to deprive her of her property through fraud (sic) misrepresentation by claiming that she engaged in theft of monies that were owned or the property” of MCC “by misusing her positions of trust and authority at” MCC. Complaint at ¶ 64. The Complaint further states, “the representations were false with intent to induce reliance of *insurance companies* and others on the representations that the reliance has caused damages and other problems for JoAnn DiFrancesco.” Complaint at ¶ 65 (*emphasis added*).

DiFrancesco does not have a cause of action for fraud against MCC under Ohio law because she alleges in her Complaint that she was damaged by an alleged fraud perpetrated on a third party. “It is well-established law in Ohio that a fraud claim may not be based on a misrepresentation made to a third party.” *O'Brien v. Ashley*, 15, 10th Dist. Franklin No. 20AP-533, 2021-Ohio-4064, ¶ 13. Here, Plaintiff alleges a “civil conspiracy to commit fraud” but Plaintiff alleges that the fraud is based on representations made by MCC to its *insurance company*, not to Plaintiff. Thus, Plaintiff’s fraud claim against MCC fails as a matter of law. Since a “civil conspiracy” claim must be based on an underlying predicate tort, the failure of the fraud claim necessarily defeats the “civil conspiracy” claim.

As DiFrancesco has failed to state a claim upon which relief can be granted, MCC’s Motion to Dismiss Count Seven of Plaintiff’s Complaint is hereby granted.

#### **8. Malicious Prosecution**

To establish a claim for malicious prosecution, the plaintiff must prove (1) malice in initiating or continuing the prosecution, (2) a lack of probable cause, and (3) the termination of the

prosecution in favor of the accused. *Thomas v. Murry*, 8th Dist. Cuyahoga No. 109287, 2021-Ohio-206, ¶ 64. Unless and until a filed case is resolved in favor of a plaintiff, a claim for malicious prosecution is not ripe and must be dismissed. *Mann v. Genoa Twp.*, 5th Dist. Delaware Case No. 01CAE03011, 2002-Ohio-727.

In her Complaint, Plaintiff alleges that MCC and one or more of its agents “intentionally and/or maliciously instituted and pursued both a civil case as well as criminal activities against her that were brought (sic) without probable cause, and she believes will be dismissed in her favor.” Complaint at ¶ 67.

MCC makes several arguments for dismissal of the malicious prosecution claim against it. However, the Court finds that the fact that DiFrancesco pled in her Complaint that “she believes [the matters] will be dismissed in her favor,” is dispositive of her malicious prosecution claim. At this point, no criminal or civil proceeding has been terminated in her favor. As such, DiFrancesco’s claim for malicious prosecution is missing an essential element and is hereby dismissed as a matter of law. MCC’s Motion to Dismiss Count Eight of Plaintiff’s Complaint is hereby granted.

#### **9. Abuse of Process**

The three elements for abuse of process are “(1) that a legal proceeding has been set in motion in proper form and with probable cause, (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed, and (3) that direct damage has resulted from the wrongful use of process.” *Mansour v. Croushore*, 194 Ohio App.3d 819, 2011-Ohio-3342, ¶ 10 (12th Dist.). There is no liability for abuse of process, however, where the defendant has done nothing more than carry out a process to its authorized conclusions. *Id.* In other words, “[a]buse of process encompasses cases where ‘legal procedure has been set in motion

in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed." *Id.*, quoting *Yaklevich v. Kemp, Schaeffer & Rowe Co.*, 68 Ohio St.3d 294, 297 (1994).

DiFrancesco's Claim for abuse of process states in pertinent part,

71. Joann DiFrancesco states that there existed an ulterior motive or motivation in the use of this civil process and that MCC and its agents used some process that we are not fully aware of yet to frame or improperly accuse of Joann DiFrancesco of theft or conversion or related civil or criminal claims which lack probable cause and will result in civil and criminal matters in favor of Joann DiFrancesco.

Complaint at ¶ 71.

MCC argues that the claim for abuse of process must be dismissed because in her Complaint, DiFrancesco expressly concedes that MCC "intentionally and/or maliciously instituted and pursued both a civil case as well as criminal activities against her", which she claims, "were brought (sic) without probable cause." *Id.* The fact is that MCC has instituted no civil or criminal proceedings against DiFrancesco. Therefore, the claim of abuse of process is wholly without merit.

Furthermore, as DiFrancesco has pled that the matter was brought *without* probable cause, her abuse of process claim fails the first essential element for such claim. Accordingly, the Court hereby dismisses the abuse of process claim against MCC as a matter of law. Therefore, MCC's Motion to Dismiss Count Nine of Plaintiff's Complaint is hereby granted.

The Court, accepting all allegations as true, making all reasonable inferences in DiFrancesco's favor, and under the notice-pleading standard, hereby finds that the facts presented in DiFrancesco's Complaint fail to state a claim upon relief can be granted. MCC's Motion to Dismiss is granted in its entirety and MCC is hereby dismissed from this action.

**B. Chubb North America Claims and Chubb North America Claims, Financial Lines Division, Westchester Specialty Group's Motion to Dismiss**

On June 27, 2022, the Chubb Defendants filed a Motion to Dismiss Plaintiff's Complaint. Plaintiff's allegations against the Chubb Defendants are limited to the declaratory judgment count. DiFrancesco requests "a declaration declaring the parties' rights and obligations under the policy or policies with respect to her claims for defense and/or indemnity arising out of the allegations in the subrogation complaint." Complaint at ¶ 28. In her Complaint, DiFrancesco named (1) "Chubb North America Claims" and (2) "Chubb North America Claims Financial Lines Division, Westchester Specialty Group" as Defendants in this matter. Both are a claims handling division within the Chubb group of insurance companies.

The Chubb Defendants' first argument is that they are not proper parties in this litigation. DiFrancesco did not attach the insurance policy under which she seeks coverage from the Chubb Defendants. However, the Chubb Defendants state that the only relevant policy seems to be ACE EXPRESS Private Company Management Indemnity Policy. Westchester Insurance issued this Policy. The named Chubb Defendants are a claims handling division. They have informed DiFrancesco of this fact, but DiFrancesco has not remedied the situation. "[I]t is well established that both plaintiff and defendant in a lawsuit must be legal entities with the capacity to be sued." *Patterson v. V&MAuto Body*, 63 Ohio St.3d 573, 574, 589 N.E.2d 1306 (1992). "In general, a plaintiff must demonstrate that a named party has the legal capacity to sue and to be sued; in other words, that the party is *sui juris*." *Doe v. Skaggs*, 7th Dist. Belmont No. 18 BE 0005, 2018-Ohio-5402. The Chubb Defendants are not entities capable of suing or being sued.

Furthermore, the Westchester Policy contains an ADR Provision that requires that any coverage dispute under the Policy must be submitted to mediation or arbitrated as a condition

precedent to commencing a coverage lawsuit. See Policy, General Terms and Conditions, § J, as amended by Endorsement. DiFrancesco fails to address either of the Chubb Defendants' arguments in her Brief in Opposition. Instead, she erroneously states, that the Chubb Defendants would like to hold "DiFrancesco to a federal plausibility standard, which is not the law in Ohio." Brief in Opposition, pg. 6.

As DiFrancesco has failed to meet her burden establishing that the Chubb Defendants are legal entities with the capacity to be sued, and has failed to comply with the relevant ADR Provisions in the Westchester Policy, the Chubb Defendants' Motion to Dismiss is granted and the Chubb Defendants are hereby dismissed from this action.

**C. Motorist Mutual Insurance's Motion for Judgment on the Pleadings**

On July 6, 2022, Defendant Motorists Mutual Insurance filed a Motion for Judgment on the Pleadings. Rule 12(C) of the Ohio Rules of Civil Procedure states 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 motion for judgment on the pleadings must be granted if, after viewing the allegations and reasonable inferences in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. *Cloud v. Baldwin*, 8th Dist. Cuyahoga No. 70795, 1997 Ohio App. Lexis 499, at \*3 (Feb. 13, 1997), citing *Peterson v. Teodosio*, 34 Ohio St.2d 161, 297 N.E.2d 113 (1973). "[W]hen ruling on Civ.R. 12(C) motion, the court may consider both the complaint and the answer as well as any exhibits to those pleadings. *Schmitt v. Educational Serv. Ctr.*, 8th Dist. Cuyahoga No. 97623, 2012-Ohio-2210. The trial court applies virtually the same standard in ruling on a Civ. 12(C) motion for judgment on the pleadings as it applies when ruling on a Civ.R. 12(B)(6) motion to dismiss filed before an answer. *Shingler v. Provider Servs. Holdings, LLC*, 8th Dist. Cuyahoga No. 106383, 2018-Ohio-2740, ¶17 N. 6.

At the outset, it is unclear what claims in DiFrancesco's Complaint are plead against Defendant Motorists Mutual. Ohio Civ. R. 8(A) and (E) require sufficient operative facts to be concisely set forth in a claim to give fair notice of the nature of the action. *Lone Star Steakhouse Saloon of Ohio v. Quaranta*, 7th Dist. Mahoning No. 01CA60, 2002 Ohio App. LEXIS 7282 (March 18, 2002). However, based on the whole of the Complaint, the Court is going to presume that Count One is the only one alleged against Motorists, and DiFrancesco does not argue otherwise in her Brief in Opposition to Motorists' Motion.

Motorists attached The Motorists Insurance Policy to its Answer, filed on May 26, 2022. The Policy does not contain "some type of Directors' and Officers' or Errors and Omission insurance coverage" as DiFrancesco is seeking. The Court determines that no other claims in DiFrancesco's Complaint are plead against Motorists. This Court, after viewing the allegations and reasonable inferences in the light most favorable to DiFrancesco finds that Motorist is entitled to judgment as a matter of law. As such, Motorists is dismissed as a Defendant in this action, remaining only as a Plaintiff in the underlying Subrogation Action.

#### **D. Remaining Motions**

On June 14, 2022, DiFrancesco filed a Motion for Sanctions against Defendant MCC, arguing that their Motion to Dismiss was frivolous. As this Court has granted MCC's Motion to Dismiss in its entirety, DiFrancesco's Motion for Sanctions is denied. Defendant Motorist's Motion to Stay Discovery/Motion for Protective Order is denied as moot. DiFrancesco's Motion to Quash or Modify Subpoenas is denied as moot.

### **III. CONCLUSION**

Based on the foregoing, this Court GRANTS Defendant the Montenerodomo Citizens Club, Inc.'s Motion To Dismiss All Claims In Plaintiff's Complaint; GRANTS Chubb Defendants'

Motion to Dismiss; GRANTS Motorists Mutual Insurance Company's Motion For Judgment On the Pleadings; DENIES Joann DiFrancesco's Motion for Sanctions; DENIES AS MOOT Joann DiFrancesco's Motion to Quash or Modify Subpoenas; and DENIES AS MOOT Motorists Mutual Insurance Company's Motion to Stay Discovery/Motion for Protective Order. PARTIAL.

**IT IS SO ORDERED.**

2/15/2023

**DATE**

A handwritten signature in cursive script, reading "Cassandra Collier-Williams", written over a horizontal line.

**JUDGE CASSANDRA COLLIER-WILLIAMS**