IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SUNNYSIDE AUTOMOTIVE IV, LLC,	)	**CASE NO. CV 13 799105**
	)	
Plaintiff	)	**JUDGE PAMELA A. BARKER**
	)	
v.	)	**OPINION AND JOURNAL ENTRY**
	)	
THERESA JACKSON,	)	
	)	
Defendant	)	
	)	

This matter is before the Court on Defendant Theresa Jackson's Motion For Summary Judgment ("Defendant's Motion"), Plaintiff Sunnyside Automotive IV, LLC's Brief In Opposition To Defendant's Motion ("Plaintiff's Brief"), the Supplement To Plaintiff's Motion For Attorney Fees And Reasonable Expenses, Now Converted To A Brief In Opposition To Summary Judgment ("Plaintiff's Supplement"), and Defendant Jackson's Reply to Plaintiff's Brief In Opposition To Motion For Summary Judgment Regarding Attorney Fees ("Defendant's Reply").[1]

In its Complaint, Plaintiff alleged that Defendant Jackson was negligent in the operation of her vehicle and that her negligence proximately caused damages to it, specifically the diminution in fair market value of a 2011 Dodge Nitro it owned and attorney's fees. Plaintiff prayed for damages in excess of $10,000, together with costs, expenses, attorney fees, pre-judgment and post-judgment interest and any other relief the Court deemed just and proper.

In Defendant's Motion and Plaintiff's Brief, respectively, Defendant asserts, and Plaintiff does not dispute, that: 1.) Defendant Jackson's insurer paid to have the vehicle repaired but initially rejected Plaintiff's demand for additional monies for the residual diminished value of the vehicle; 2.) once or after the lawsuit was filed, and upon the recommendation of counsel retained to represent Defendant,

[1] On October 16, 2013 or the date this matter was set for trial, and upon the parties' joint oral motion, this Court converted Defendant Theresa Jackson's Motion In Limine Regarding Attorney Fees filed on October 2, 2013 to a Motion For Summary Judgment, converted Plaintiff's Motion For Attorney Fees And Reasonable Expenses filed on October 15, 2013 to a Brief In Opposition and allowed Plaintiff to file Plaintiff's Supplement.

an offer in the amount of the claimed residual diminished value of the vehicle or $3,120.19 was made to Plaintiff; but 3.) the offer was rejected since Plaintiff maintained and continues to maintain that it is entitled to attorney's fees incurred to pursue the residual diminished value damages.

Civ. R. 56(C) provides in relevant part as follows:

> 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. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

"In order to properly grant a summary judgment motion pursuant to Civ. R. 56(C), a trial court must review the pleadings, deposition testimony, and other evidentiary materials and determine that: '*** (1) No genuine issue as to any material fact remains to be litigated; (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 viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 472, 364 N.E.2d 267, 274; ***.'" *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. *Harless v. Willis Day Warehousing Company, et al.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46, 47. Civ. R. 56(E) requires that the adverse or non-moving party set forth specific facts showing that there is a genuine issue for trial and the non-moving party must so perform if he is to avoid summary judgment. *Id.*, 54 Ohio St.2d at 65.

"Although a party seeking summary judgment must inform the trial court of the basis for its motion, the movant need not necessarily support its motion with evidentiary materials which directly

negate its opponent's claim. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 323. Rather, the movant may sometimes meet its burden by pointing out to the trial judge 'that there is an absence of evidence to support the nonmoving party's case.' *Id.* at 325. See, also, *Hodgkinson v. Dunlop Tire & Rubber Corp.* (1987), 38 Ohio App.3d 101, 526 N.E.2d 89." *Johnson v. Great American Ins. Co.* (1988), 44 Ohio App.3d 71, 72-73.

In her Motion, Defendant correctly argues and cites to Ohio case law for her proposition that Ohio follows the "American Rule", i.e., attorney fees are not recoverable by a prevailing party absent a statute authorizing such an award[2]; and ordinarily, attorney fees are not recoverable in actions for damages[3]. Defendant acknowledges that there are exceptions to this rule[4], but argues that none apply herein, there can be no direct action against the Defendant's liability insurer, and negotiations by it on behalf of Defendant cannot form the basis for bad faith.[5] According to Defendant, Plaintiff's claim for attorney's fees is a back-door action against Defendant's liability insurer and, as the 5th District Court of Appeals did in *Weisel*, this court should reject it as not allowable under Ohio law.

In Plaintiff's Brief, Plaintiff does not dispute Defendant's argument that the "American Rule" followed in Ohio is that each party is responsible for its own attorney fees and that the exceptions are when a statute or enforceable contract provides for them, or in the context of a bad faith claim by an insured against his or her own insurer. Plaintiff does not cite to any contractual provision that warrants

---

[2] *Sorin v. Bd. Of Edn.* (1976), 46 Ohio St.2d 177.

[3] *Weisel v. Laskovski.* 2005 Ohio App. LEXIS 1115 (5th Dist.) (citing *Gustafson v. Cotco Enter.* (1974), 42 Ohio App.2d 45, 47, 52).

[4] In *Wilborn v. Bank One Corporation*, 121 Ohio St.3d 546; 2009-Ohio-306; 906 N.E.2d 396, ¶7, the Ohio Supreme Court explained: "Ohio has long adhered to the 'American rule" with respect to recovery of attorney fees; a prevailing party in a civil action may not recover attorney fees as a part of the costs of litigation. [Citations omitted.] However, there are exceptions to this rule. Attorney fees may be awarded when a statute or an enforceable contract specifically provides for the losing party to pay the prevailing party's attorney fees, *** or when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant." [Citations omitted.]

[5] *Weisel v. Laskovski, supra,* at ¶25, citing *Zoppo v. Homestead Insurance Company* (1994), 71 Ohio St.3d 552, 1994 Ohio 461, 644 N.E.2d 397.

an award of attorney's fees to it, and does not argue directly that Defendant acted in "bad faith" to support its claim that Defendant is liable to it for attorney's fees.

Instead, Plaintiff relies upon a statute, specifically, R.C. 2323.51 which reads in relevant part as follows:

> §2323.51 Frivolous conduct in civil actions
>
> (A) As used in this section:
> (1) "Conduct " means any of the following:
> (a) The filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, ***;
> (2) "Frivolous conduct" means either of the following:
> (a) Conduct of an *** **other party to a civil action** *** or **other party's counsel** of record that satisfies any of the following:
> (i) It obviously serves merely to harass or maliciously injure another party to the civil action ***or is for another improper purpose, including, but not limited to, causing unnecessary delay or needless increase in the cost of litigation.
> (ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of exiting law, or cannot be supported by a good faith argument for the establishment of new law.

(Emphasis added by bold print.)

Plaintiff asserts that it is entitled to attorney fees because Defendant Jackson engaged in frivolous conduct as defined by R.C. 2323.51(A)(2)(i) and (ii), by refusing to pay it an amount it was clearly due under Ohio law and engaged in conduct that required it to file this lawsuit and incur unnecessary delay and legal costs. Plaintiff cites *Orbit Elecs., Inc. v. Helm Instrument Co.*, 167 Ohio App.3d 301, 317, 2006-Ohio-2317, 855 N.E.2d 91 (8th Dist.) for its proposition that "[c]onduct is frivolous if no **reasonable lawyer** would have taken the action in light of the existing law."[6] Moreover, Plaintiff cites and relies upon three cases for its proposition that "[b]ecause Jackson, **through Spencer and**

[6] (Emphasis added by bold print.) Plaintiff's Brief, at page 4. Of course, it is clear from both Defendant's Motion and Plaintiff's Brief that it was not the Defendant's lawyer who took the position that Plaintiff was not entitled to the diminished residual value, but rather her liability insurer.

Grange, frivolously refused to settle Sunnyside's claim, Sunnyside is entitled to attorney fees and reasonable costs."[7]

In an attempt to support its argument, Plaintiff attached to its Brief eight (8) exhibits[8], three of which purport to establish that prior to the filing of this lawsuit, Plaintiff, both directly and through counsel, made a demand upon Defendant's insurer for payment of the residual diminished value or "deficiency" or "deficit" of $3,100, but Defendant's insurer refused to pay it.[9]

However, Plaintiff has not submitted an affidavit of any person with knowledge averring that these proposed documents or exhibits are true and accurate copies of what they purport to be. Therefore, they do not constitute admissible Rule 56(E) evidence and cannot be considered for purposes of opposing Defendant's Motion asking that this Court find as a matter of law that Plaintiff is not entitled to attorney's fees and for supporting Plaintiff's argument that Defendant engaged in frivolous conduct so as to warrant attorney's fees under R.C. 2323.51(A).

Even if this Court were to consider these Exhibits, particularly since Defendant did not object to their consideration in Defendant's Reply and indeed, responded to Plaintiff's arguments arguably supported by Plaintiff's proposed Exhibits, the following remains. First, they do not support a finding that "a party to a civil action", i.e., Theresa Jackson, or the "party's counsel" engaged in frivolous conduct.[10] Indeed, any alleged frivolous conduct, i.e., initial refusal to pay the residual diminished value

---

[7] (Emphasis added by bold print.) Plaintiff's Brief, at page 6, citing *Fridley v. Duty*, 69 Ohio Misc.2d 24, 649 N.E.2d 930 (C.P.1995); *Jefferson v. Creveling*, 9th Dist. No. 24206, 2009-Ohio-1214, ¶14; and *Orbit Elecs., Inc. v. Helm Instrument Co.*, 167 Ohio App.3d 301, 317, 2006-Ohio-2317, 855 N.E.2d 91 (8th Dist.).

[8] Exhibit 1 is a copy of a Traffic Crash Report associated with the accident giving rise to this lawsuit; Exhibit 2 is a copy of a "Used Car Trade Sheet" describing the 2011 Dodge Nitro; Exhibit 3 is a copy of a receipt for $100.19 for a used vehicle inspection of the Nitro; Exhibit 4 is a copy of a contract for the sale of the Nitro by Plaintiff to Sullivan Auto Group for $14,030.00; Exhibit 5 is a copy of a September 19, 2012 letter from Michael Cuva, General Manager for Plaintiff, to Ryan @ Grange Insurance; and Exhibit 6 is a copy of a letter from Ryan Spencer, Claims Representative of Grange Insurance to Mike Cuva of Sunnyside Toyota; Exhibit 7 is a copy of an October 22, 2012 letter from Attorney Robert A. Poklar to Ryan Spencer of Grange Insurance; and Exhibit 8 is a copy of a Time Report.

[9] Plaintiff's proposed Exhibits 5, 6 and 7.

[10] O.R.C. 2323.51(A)(2)(a). To the extent that the proposed Exhibits do not establish that Theresa Jackson, the named defendant in this lawsuit, or her retained counsel engaged in frivolous conduct, this case is distinguishable

of Plaintiff's vehicle, was exhibited by Defendant's liability insurer, Grange.[11] Indeed, in his letter to Grange dated October 22, 2012, Attorney Poklar advised Grange that if it failed or refused to pay for the difference in the fair market value, his office had been directed to "pursue further legal action against **Grange Insurance**."[12] As did the Fifth District Court of Appeals in *Weisel*, this Court finds that Plaintiff's claim for attorney's fees in the context of this lawsuit against Theresa Jackson is a back-door attempt at a direct action against her liability insurer, Grange. And, to respond to Plaintiff's assertion that the trial court's decision in *Fridley v. Duty, supra*, supports her argument that attorney's fees should be awarded pursuant to O.R.C. 2323.51, because of the alleged frivolous conduct of Defendant's liability insurer, that case is distinguishable from this matter. In *Fridley*, the case proceeded through trial; and the trial court, taking judicial notice of another very similar case involving the same liability insurer, concluded that the insurer had engaged in a practice designed to frustrate individuals into giving up otherwise valid claims.

Accordingly, this Court finds that as a matter of law, Plaintiff is not entitled to attorney's fees or reasonable expenses and **GRANTS** Defendant's Motion.

Pamela A. Barker 10-31-13
Judge Pamela A. Barker Dated

RECEIVED FOR FILING

OCT 31 2013

CUYAHOGA COUNTY
CLERK OF COURTS
By Deputy

---

from *Jefferson v. Creveling, supra*, and *Orbit Elecs., Inc. v. Helm Instrument Co., supra*, cited and relied upon by Plaintiff, since in both of those cases, attorney fees were awarded based upon the conduct of the actual parties and/or lawyers for those actual parties.

[12] (Emphasis added by bold print.) Exhibit 7 attached to Plaintiff's Brief, at page 2.